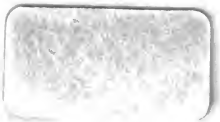

THE

FEUDAL FORMS OF SCOTLAND

VIEWED HISTORICALLY

SINCE THE FIRST APPEARANCE OF WRITTEN TITLES TO LANDS IN THAT PART OF GREAT BRITAIN.

BY

WILLIAM RODGER.

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PREFATORY NOTICE

DESIGN OF THE WORK.

THE following treatise, comparatively brief, is the result of much research, prosecuted for many years, at such uncertain intervals as other avocations more obligatory would permit. A considerable portion was written even before the passing of the Statutes of 1845 and 1847 affecting Title Deeds,—which, however valuable practically, as abridging and improving the forms of conveyancing, have neither introduced any new nor abrogated any old feudal principle. The obligation to infeft, the *modus tenendi*, the warrant for resignation, and the precept of sasine, though they may now be expressed with almost ludicrous brevity, are yet in perfect accordance with those principles

which gave rise to the bulkier forms now destined to pass rapidly and for ever into disuse. The author, therefore, fortunately for himself, did not find it necessary to cancel or to remodel much of what had been previously written. Irrespective, however, of those Statutes, his original plan has been considerably varied and extended. When first sketched, nothing more was contemplated than a familiar exposition of the peculiarities of the formal obligation to infeft, and a plain narrative of the circumstances which led to its invention and to the use of that singular form, the *tenendas a me vel de me*,—matters which, from a variety of causes, are imperfectly known to many of the Profession. His first plan had been acted upon for some time, when it occurred to the author (who had been insensibly led, in the ardour of pursuit, into a wider range of observation and research than he had at all contemplated), that the utility and interest of the work might

be greatly increased, were it so constructed as to present a practical chronological view of the Feudal Forms of Conveyancing peculiar to Scotland, and of the most material changes these have undergone since the now remote age when our Scottish ancestors first began to make use of written titles to lands—until the passing of the foresaid Statutes.

Mr. Walter Ross, in the introductory chapter to his second volume, has given us to understand that Lord Kames intended to have illustrated historically the Law of Scotland from the forms of ancient Deeds. Something of the same kind had probably been contemplated long previously, by the Compiler of the famous manuscript collection in the Advocates Library, attributed to the first Earl of Haddington—a collection of incalculable value, had the transcripts it contains been made by competent hands, and with sufficient care.

My purpose, though perhaps sufficiently

ambitious, is not to soar so high—not to treat of every topic that might be suggested by a critical examination of ancient titles. Any notice I may take of original feudal grants will occupy little space; and I have no intention of at all noticing Burgage-holding, or the forms of heritable securities for debt, unless illustratively of what else may chance to be under discussion; the main purpose in view being the practical illustration from real instances ancient and modern, of the forms connected with the transference of feudal rights previously constituted.

But, first, I must beg leave to devote several chapters to purposes of explanation, with the view especially of settling the precise meaning of various technical terms of frequent occurrence, and superseding the necessity of many detached notes of explanation that might otherwise have been requisite throughout the work in its different stages.

November 1857.

ARRANGEMENT.

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THE FEUDAL FORMS OF SCOTLAND

VIEWED HISTORICALLY.

CHAPTER I.

THE OBLIGATION TO INFEFT.

Sasine and *Infeftment*,—these words are often used indiscriminately, but, strictly speaking, they are not synonymous. The old Charter-Latin word *sasina* (sasine or seisin), which, in a primary sense, is synonymous with possession, does not denote personal occupancy, but that kind of possession of an heritable property which a disponee is understood to have obtained when it can be seen from the sasine record that something has been done which, in law and practice, is construed to be equivalent to, or to suffice instead of real or literal delivery, of which lands and heritages are incapable. To give sasine is to give constructive delivery, and a duly recorded Instrument or notarial certificate of Sasine is legal evidence, and the only admissible evidence that such delivery has been made. Infeftment, properly speaking, is equivalent to feudal investiture, and is a more comprehensive term than sasine, as it includes the warrant for giving the sasine (that is, the charter and precept, or the disposition and precept, or whatever may be the warrant), as well as the sasine itself. An Instrument of Sasine, *per se*, is not an infeftment, neither is its warrant an infeftment. It is only when taken in con-

nexion that they constitute an infeftment or investiture; yet, in old law-language, an original charter was not unfrequently termed an infeftment.

In England any freehold may be at once transferred from a seller to a purchaser by an Enfeoffment, or a deed of Feoffment, which is just a deed of conveyance containing dispositive words, and concluding with a warrant of attorney to a third party to enter into the natural possession in the seller's name, and then to cede or deliver that possession to the purchaser or his attorney. This is called livery of seisin—and a memorandum on the back of the feoffment, of the time and mode of livery, makes the transference complete, not only proving the deed to be a delivered deed, but that it has taken full effect. Equivalent evidence may even suffice, for the memorandum of livery may be dispensed with where a purchase has been made with a view to residence, and where the purchaser has actually obtained personal occupancy. In English practice there never was any such form known as a notarial instrument of sasine, or even an obligation to infeft. A purchaser needs no such obligation. The deed of feoffment takes effect when, and only when, the grantee is put into possession either literally or constructively. The delivery of the deed, and of the freehold thereby conveyed, is just one act, and by that one act the investiture or feoffment is complete. The form of conveyance here referred to, long the only form known in England, is now however almost entirely superseded by the more modern form of Lease and Release, of which more particular notice is intended to be taken in a future chapter.

With us an original feu-charter, or original feu-disposition, resembles, in some respects, the English deed of feoffment. The granter lays the foundation of the intended investiture, by disponing to be holden of himself and his heirs, and by subjoining a relative precept of sasine; but the delivery of the deed is one act, and the attainment of the contemplated sasine is another act. The granter of an *original* feu-right with a precept of sasine, has however no occasion to insert an

obligation to infeft, because he has thereby furnished the grantee with the means of obtaining a complete investiture whenever he chooses to make use of the precept—when sasine follows, and when the instrument, or formal notarial certificate, is duly recorded, the investiture is complete—holding directly of the maker or the proper superior of the feu-right.

But when the party who has obtained such investiture sells or dispones to another party sasine on his disposition, though it may operate as an interim security to the purchaser, will not have the effect of denuding the seller of the title he holds under the proper superior, and vesting the same in the purchaser. Such sasine may even be dispensed with. At all events, the proper superior of the feu-right must himself be applied to before the purchaser can be completely vested,—that is, received as vassal in the seller's stead. There are two modes of attaining that end, both open to the purchaser—resignation and confirmation—and he is left to adopt the one or the other, or both, at his own time, and at his own expense.

We never speak of sasine except in reference to heritage, and never in reference to personal occupancy. We never say of a tenant when he obtains possession that he has got sasine. In ancient times, however, leases for life, or for a long period of years, sometimes contained a precept of sasine, and sometimes even a tenendas and reddendo. In those days, a lease must just have been regarded as a temporary feu-right; but sasine in a tenant's favour would now be reckoned an incongruity, because he is merely the temporary usufructuary, not the temporary owner.

With regard to the ceremony so long in observance, and now entirely dispensed with, of publicly giving upon the ground, to the disponee or his attorney, what was termed heritable state and sasine, with real actual and corporal possession, its purpose was obvious—constructive delivery to perfect the transference. It is obvious, that without the adoption of some conventional form to serve instead of what is physically impossible, commerce in land would be attended

with great uncertainty and insecurity. We shall see hereafter that our ancestors were acquainted with symbolical forms long before they made use of the notarial instrument of sasine. If not deficient in any requisite formality, and if it followed on a sufficient warrant, that instrument when introduced into practice was received as legal evidence of a vested right of ownership. The recorded formal certificate of a notary-public that he has given sasine, has now, by Statute, the same effect. A disponee, when so vested, is held in law to be absolutely in possession *qua* proprietor, and this though he may never have set his foot on the ground. On the other hand, though he may have purchased the property, paid the price, received a valid conveyance, and be personally dwelling in his own house on his own ground, yet, if uninfeft, he has not got legal delivery, he has not secured the legal protection that a valid sasine would afford—he may sell, it is true, but if he chooses to retain his purchase, he is not yet entitled to all the rights and privileges of ownership.

The ceremonies of symbolical sasine, or constructive delivery, must have been a refinement on the simple fact of literally inducting a grantee into possession. In a primitive state of society, when a baron made a grant to an adherent, he openly put him in possession, to make the fact known to the grantee's neighbours and co-vassals. This, the simplest form of conferring land, was probably in use long before the existence of any written title. In a remote age, when agriculture was in a rude state, and the country frequently desolated by hostile inroads and intestine commotions, land would be reckoned of little value; there would be little or no written title, and little or no regard paid to any other criterion of ownership than personal occupancy. In later and more peaceful times, when some degree of cultivation has taken place, and land has become somewhat more valuable, some regard would be paid to written title—many ages would, however, elapse before personal occupancy would begin to be reckoned of little avail as evidence of ownership.

As the law now stands, and has long stood, personal resi-

dence neither improves nor impairs the right of a proprietor. The sasine to which the obligation to infeft has reference, is not the personal possession of ancient times. It is just an act of legal or constructive delivery, in virtue of a competent warrant, to complete the purposed transference, and vest in the disponee a real right of ownership. Personal possession in a literal sense, may follow or may not—and if it does follow, it may, without detriment, be discontinued the next day. But the possession which a tenant gets at the commencement of his lease, though not now called sasine, is just the sasine of ancient times—and it is a curious fact, that though now entered upon by the tenant without any definite legal formality—though the law, as it were, allows the possession to commence unheeded, and though no writing be requisite to record the fact, yet a lease has no vitality till the lessee has attained possession. Till then, it is a mere promise or obligation on the part of the landlord, to give the use and occupation of the farm or other premises for the period and under the conditions agreed upon. In the case of a farm, the landlord usually contracts that the incoming tenant shall have entry to the houses and pasture-ground at a Whitsunday term, and to the arable lands at the following Martinmas. If the outgoing tenant will not give place, the new lessee cannot force him to do so. He can only have recourse against the landlord for implement of his express or implied obligation to remove all impediments to his entry. If no impediment exists, the incoming tenant is allowed to consult his own convenience, and to enter into possession in such manner and at such time or times as may be arranged between him and the outgoing tenant. But so soon as the new lessee has attained peaceable personal possession, his legal security is complete; and so long as he performs the obligations incumbent on him by the lease, he cannot be turned out of the possession until its expiry, and not even then, unless the landlord shall have duly pre-indicated his desire that the lessee shall then remove.

Very early mention of *sasine* may be found in the ancient

Cartularies or Registers of the Abbeys of Dunfermline, Melrose, &c. For example, the Writ No. 25 in the "Registrum de Dunfermelyn," is a Precept by King David I, about the year 1140 or 1150, regarding a Toft in the Royal Burgh of Perth—"*quod swain saisivit*"—that is, which a person of the name of Swain, then or previously possessed. And the Writ No. 4. in the "Liber de Melros," is a Charter of Donation granted about the year 1160, by Walter the Steward to the Abbot and Convent of Melrose, of four carrucates of land which King Malcolm IV had given him—"et per suos probos homines *me fecit saisiri*,"—caused me be put in possession.

The first volume (last published) of the Acts of the Parliaments of Scotland contains (at p. 90 of Appendix to Preface) a brief of service and procedure thereon, in the time of King Alexander III, of which I beg leave to present literal versions, for the sake of expeditious perusal. The originals, and sundry other Brieves and Retours of that age, are, we are told (p. 48), in preservation in the Tower of London. They were among the mass of ancient writings carried off by Edward I in 1291, and have, fortunately, escaped destruction.

Brief of inquiry concerning the succession to the heritage of Simon, the Gatekeeper of the Castle of Montrose.

[21 *March* 1261-2.]*

Alexander, by the Grace of God, King of Scots, to Robert of Mountalt (Muat) his beloved and faithful Sheriff of Forfar, and to his bailies, Greeting. We command and charge you, that ye cause inquiry to be made, diligently and faithfully, by worthy and faithful men of their country, whether Margaret, Agnes, Swannoc, Christian, and Mariot, daughters of the late Simon, Gatekeeper of Montrose, be the nearest and lawful heirs of the said late Simon in the land of Inianey, and in the office of gatekeeper of our Castle of Montrose; and whether the said late Simon died *vest and seased as of fee* in

* In Scotland, before the year 1600, and in England, before 1752, New-year's day was the 25th of March, or Lady-day. The change to the first day of January was effected here by an Ordinance of the Scottish Privy Council, dated 17th Dec. 1599, and in England, by the Statute 24th Geo. II chapter 23.

the said land and office: and all these things, when diligently and faithfully inquired into, together with the yearly value and reasonable extent of the above-named land, ye shall cause be sent to us as soon as you possibly can, along with this brief. Witness ourself, at Montrose, the 21st day of March, in the 13th year of our reign.

Inquest thereupon :—

This is the inquest made on the precept of the Lord the King, by Robert of Mountalt, Knight, concerning the Land of Inianey, near Falerikkum, by these persons, to wit, the barons of the barony of Old Montrose, of Rossie, of Fithie, Kinnell, Inverkeilor, Inverlunan, Kinblathmont, Lexie, Dun, Brechin, Kinnabbir, Little Pert, Melgund, Panmure, Panbride, Tunrie, and Rescobie, and a great number of the worthy burgesses of Montrose: All those above named being sworn, say, that a certain man who was called Crane, had and held the said land heritably, by the gift of King William, and in the said land died *vest and seased as of fee:* AND after his decease Swaine, his son, held and had the said land heritably, and died *vest and seased in the said land as of fee:* AND after his decease, Simon, his son, held and had the said land heritably, and in the said land died *vest and seased as of fee:* AND that the said Simon had five daughters by two spouses, to wit, Margaret, Agnes, Swannoc, Christian, and Mariot: AND that the said Crane, Swaine, and Simon never went to the King's host, or paid subsidy, or did anything else in the world, for the said land, except serving the office of gatekeeper of the Lord the King's castle of Montrose: AND those who were sworn say, that the said women are the nearest and lawful heirs of the said Simon now deceased.

From the above, and the other brieves and retours in said Appendix, and particularly from the brief at page 89, which was appointed to be brought along with the relative retour, *ad Regis capellam*, it seems clear, that there must have been a public office of Chancery in Scotland, and set forms of Chancery in use, a quarter of a century, at least, before the death of King Alexander III.

The finding in the above retour, that Crane, Swaine, and Simon had respectively died vest and seased as of fee in the said land of Inianey, was just equivalent to finding, that

each of them had been in possession as proprietor—the first by the gift of King William, and the others consecutively by inheritance. In this case constant personal occupancy of the land could not have been meant, for, of necessity, the keeper of the castle-gate must have had his domicile *within the castle*, but there was nothing to prevent him from possessing by servants or tenants. Most probably the original gift was made without any writing. It would not have been on that account the less effectual. It was a matter with which no churchman could have had any concern—and to what purpose, in such a case, make use of writing, when few, or none, of the laity could read or write? At any rate, it seems no great stretch of probability to hold that the original gatekeeper's son and grandson took up the succession to the heritable office, and to the land as pertaining thereto, without any writing, and during their respective lifetimes, possessed on apparency.

It will be seen that the above retour related exclusively to the land attached to the keeper's office. Most likely the office itself was understood to have returned to the Crown, as incapable of being inherited or exercised except by an heir-male —but the deceased's daughters having, perhaps, nothing else to depend upon, were allowed, it would appear, to keep the land. No information has, however, reached us regarding the mode in which they were put in possession after being served heirs. In a future chapter some historical memoranda may be inserted, from which the reader may be left to draw his own conclusions regarding the mode then in practice. Here it may be taken for granted, that the practice of symbolical sasine in feudal property, was as yet scarcely introduced, and that the Notarial Instrument of sasine was entirely unknown. We may learn, however, from the *Leges Burgorum* (compiled, it is believed, in the time of King David I, and whereof a number of copies are yet extant in old manuscript volumes, but all more or less vitiated by errors and interpolations), that when a sale took place within a royal burgh, where changes of ownership must have then occurred much more frequently than in the country, the rule was, that he who sold should enter

the house, and then pass out, and the buyer, being outside, should then enter, and each of them should give the provost (or magistrate present on the occasion) a penny, the one for his outgoing and the other for his entry and sasine.—*Leges Burgorum*, No. LII.

Therefore to give sasine within a royal burgh was to put into possession not symbolically, but literally. The law marked No. CXI, of which the following is a literal version, seems altogether inconsistent with the above:—

If sasine be given within the burgh, before the neighbours, although given outside the Burgh-Court, and not previously spoken of in Court, such sasine shall be sufficient.

This passage must have been interpolated many years after the adoption of the first quoted law. It was impossible that the seller and purchaser could be upon the ground of the property sold, and within the Burgh Court-house at one and the same time. At the time the interpolation was made, there must have been a recognised practice of giving sasine of property in the country, symbolically, within the feudal superior's Court-house, but as sasine was never given within Royal Burghs otherwise than upon the premises, the pretended explanatory law could never have been thought of.

It will be seen hereafter, that the forms of giving sasine in feudal property, were long uncertain and various. The Notarial Instrument, however, as it contained a special narrative of facts and circumstances, must necessarily have had the effect of settling and fixing, by usage, the proper forms of symbolical sasine, or constructive delivery.

To some men of business the information may be new, that the formal obligation to infeft did not begin to appear till more than a century after the Notarial Instrument of Sasine had come into use—and that such obligation is not understood to be fully implemented by the granter giving sasine or possession to the grantee, either symbolically or literally. The grantee may already be in the natural possession, or every obstacle may be removed to his immediately

entering into possession; but, indeed, the nature and import of the obligation cannot be properly understood without a knowledge of the circumstances which gave rise to it, and to the complicated forms long rigidly adhered to, as matters of ordinary practice, till superseded by the Disposition—all which shall, in due time, be brought under review in chronological order—at least such is my intention.

The obligation to infeft is never made use of by correct men of business, except in the transmission of an heritable right already constituted. It would plainly be superfluous to insert such an obligation in an original feu-charter or feu-disposition; because the granter, by delivery of the deed, furnishes the grantee with the means of instantly doing the only thing requisite for his permanent security. Would it not be idle to bind himself to do what he has already done? The lands have been disponed to be holden of and under the granter and his successors, for the annual return agreed upon —then follows a precept of sasine—and nothing more is requisite than to obtain a notarial instrument, or formal certificate, and send it to the publication-record. A feu-charter, or feu-disposition, and a relative recorded sasine (provided the disponer's own title be all right), constitute a perfect investiture, in which no other party has any interest save the granter and grantee, and their respective heirs and successors, and of which the granter or his vested successor is the sole superior. In law-language such an investiture is termed a *public* investiture. The superior's interest in the lands feued is termed the *dominium directum*, and the vassal's the *dominium utile*. So long as the original vassal continues in life the feu or fee is *full*. It is also full when the heir of the vassal obtains sasine on a new warrant from the superior—or when the superior receives as vassal another party deriving right to the feu by purchase or donation. Whilst the fee is full, the *dominium utile* may be validly alienated without asking the superior's leave, and any purchaser or donee may again alienate at his pleasure. But although any disponee, since the abolition of ward-holding, may be validly and securely

infeft without the aid of the superior, yet an imperfection will always adhere to the title of the proprietor for the time, till he be received as vassal by the superior. With this imperfection the superior, till applied to, or till the fee shall have become vacant by the decease of the original or of the last entered vassal, has no concern. Doubtless many pernicious and oppressive conditions have been and may yet be invented for insertion in new feu-rights; but, unless some unfair advantage has been taken of the ignorance of the original vassal, or his man of business, the superior, whilst the fee is full and whilst he receives regular payment of his feu-duty, has no right to challenge or even take the slightest notice of any alienation. A purchaser may, of his own accord, if so inclined, apply to be entered with the superior, in the room of the seller or of the last-entered vassal; but if he has received a proper disposition, he need not as yet incur that expense.

On the death of the original or of the last-entered vassal, the fee becomes vacant; or, in other words, the lands are in non-entry; and the superior is entitled to expect that the party who has right to the lands by inheritance, or by gift or purchase, shall apply for a renewal of the investiture, and make payment to him of the feudal casualty or entry-money which has then become due. The entry-money payable by an *heir*, being one year's feu-duty extra in feufarm-holding, and one year's blench-duty in blench-holding, is termed *relief*, and that payable by a party who has acquired right in any other manner than as the last vassal's heir (such party being styled a singular successor) is termed *composition*. Sometimes the composition is by the original feu-right fixed at the same rate as the relief, and sometimes at double or triple that rate. In any such case the entry of singular successors is said to be *taxed*. If left *untaxed*, a subject-superior is entitled to a year's rent under certain deductions. The said entry-money of Relief or Composition, as the case may be, is altogether different from the bygone non-entry duties, which the superior is also entitled to claim if the lands have been long in non-

entry. In blench-holding, a subject-superior may claim for each year of the non-entry a sum equal to what is called the new extent. In feufarm-holding there is only one extent, and that is just the yearly feu-duty—so that when lands are so held, the superior can on no occasion claim any other arrears than arrears of feu-duty. In the case of Crown or Principality lands, formerly holden ward or taxed ward, and now holden blench, there can only be claimed a sum equal to one per cent. of the valued rent of the lands, for each year that they have been in non-entry.

The form of the entry to be granted will depend on the circumstances of the case. If held of a subject-superior, the heir of the late vassal may be entered by precept of Clare Constat—and the heir of an infefted but unconfirmed purchaser or disponee, by charter of confirmation and precept of Clare Constat. Any disponee may be entered by charter of resignation or confirmation, according to the state of his titles —or (if one or more sasines require confirmation, and the last disponee be uninfeft) he may be entered by a charter combining both forms—resignation and confirmation.

When a superior grants a charter of resignation, containing, of course, a precept or warrant for new sasine, the grantee is not understood to be effectually entered till he has obtained sasine on such charter. As yet, he has acquired nothing more than a personal right to get himself recorded as the new vassal. He may not avail himself of that right—he may assign the open precept, and allow the assignee to obtain sasine. In that case, the assignee instantly becomes the vassal, in the same manner as if the charter had been granted directly in his favor. During the interval between the date of the charter and the date of expeding the sasine, the lands are said to be still in non-entry, though, perhaps, it would be more correct to say that the feudal-title is in a state of transition. In modern times, it can rarely happen that a superior can have reason to complain of culpable *mora*—and in any event, so soon as sasine is expede, it puts an end at once (unless litis-contestation has ensued) to all speculation as to

what was the state of matters during that interval, however considerable.

I am not aware that there is any occasion for any other explanatory remarks on the obligation in question at this early stage. As yet, it would be premature to attempt to explain the difference in meaning between the obligation to infeft by two manners of holding, *a se vel de se*, and by one manner of holding *a se*, and why, in either case, it is provided that the disponee may be invested either by resignation or by confirmation, or by both. But it ought always to be kept in remembrance, that resignation and confirmation are not two modes of holding, but two modes of being entered or invested as the vassal of the immediate superior—also, that it is an essential principle in Scottish conveyancing, that there cannot be in *co-existence* two separate manners of holding, or two separate superiors—the same feu-right cannot be holden of and under the seller, and of and under the seller's superior, at one and the same time. The purchaser may at first hold of the seller as his temporary superior; but such holding will be extinguished or superseded, or evacuated, when he is received as vassal by the seller's superior—who, though he may grant two investitures, cannot create two different manners of holding. Both investitures (whereof one or other is necessarily superfluous) shall apply to one and the same estate, and to one and the same feudal-holding. These principles can have no place except in Scottish conveyancing, and could not have been adopted or recognised, even with us, till after the obligation to infeft had become part and parcel of our ordinary practice.

I propose, in the next place, to notice briefly the form and nature of the respective charters of resignation and confirmation when they first came into use—and first, of confirmation, which, though now considered less satisfactory than the other form, because the sasine-record can carry no indication of its existence when it happens to stand alone, seems entitled to priority of notice, in respect of priority of appearance.

CHAPTER II.

THE CHARTER OF CONFIRMATION.

In very ancient times, say before the year 1300, or, to be rigidly exact, before the year 1290, there was a form of confirmation in use in England, as well as in Scotland—alike, or to the same effect, in both kingdoms, but different in its nature from the confirmation now, and ever since its introduction, peculiar to Scotland.

Version of a Confirmation by King Stephen in favor of the Monks of Canterbury.

[*Between* 1135 *and* 1154.]

Stephen, king of the English, To the Bishop of Norwich, and to the Justiciaries, Sheriffs, Barons, Officers, and all the king's faithful men of Norfolk and Suffolk, Greeting. Know ye that I have granted and confirmed that Donation which Henry of Ria made to God and the Monks of the Holy Trinity of Canterbury, of the Land of Diepham, in excambion of the Land of Muchberdeston, which Hubert of Ria, Henry's father, gave to them (to be inherited) on his death: Wherefore it is my will, and I firmly command, that the foresaid monks shall have and hold that land well and in peace, and honorably, as the foresaid Henry gave and granted it to them, and confirmed it by his charter, and as they best and most freely hold their other eleemosynary lands and tenures. Witnesses, &c. —*Form. Angl.* No. 69.

Version of a Confirmation by King William the Lion in favor of the Canons of Holyrood.

[*Between* 1165 *and* 1171.]

William, by the Grace of God, King of Scots, To the Bishops, Abbots, Earls, Barons, Justices, Sheriffs, and all his worthy men, as well future as present, Greeting. Know ye that I have granted, and by this my charter confirmed to the church of the Holy Cross near Edinburgh, and to the friars there serving God, the church of Tranent, which king Malcolm my brother gave and by his charter confirmed to them, in perpetual almsgift, for providing them in apparel; with all the pertinents and liberties which justly belong to the foresaid church; in lands towit and waters—in pastures and meadows—in wood and plain—as free and quiet as any almsgift within my whole realm is most freely and quietly possessed, and as Waleran, king David's chaplain, ever held it most freely and quietly. Witnesses, &c.—*Charters of Holyrood*, No. 35.

The following agrees with King Stephen's charter, in words and form, still more closely than the above. The Deed thereby confirmed cannot have been greatly different from a Donation, though not designated as such, but rather as a relinquishment of a disputed claim.

[*Circa* 1190.]

William, by the grace of God, King of Scots, To the Bishops, Abbots, Earls, Barons, Justices, Sheriffs, Provosts, Officers, and all the worthy men of his whole realm, clergy and laity, Greeting. Be it known to present and future, that I have granted, and by this my charter confirmed to God and the Church of St. Mary of Melrose, and to the monks there serving God, that Renouncement which my Steward Alan, the son of Walter, made to the said monks, in my presence and in my full court, of all claim and every right which the said Alan or his heirs had or ever could have to the pasture on the west side of the Leader: Wherefore, it is my will, and I command, that the foresaid monks of Melrose shall have and hold the foresaid pasture for ever, free and quit of all claim of the foresaid Alan and his heirs, as freely and quietly, fully and honorably, as the charter of my foresaid Steward Alan, the son of Walter, testifies. Witnesses—Josceline, Bishop of Glasgow, &c.—*Liber de Melros*, No. 98.

In those remote times the granter of any charter (other than of confirmation) almost always made use of the self-same words of bestowal: *Sciatis me dedisse*, &c., or, *Sciant præsentes et futuri me dedisse*, &c. Be it known, that *I have given and granted, and by this my present charter confirmed.* The only difference in this part of the Deed, between a charter of confirmation and any other charter, was this: that in the former the granter omitted the word *dedisse*, especially if in place of confirming *the lands* he confirmed *the donation.* There may be seen among ancient documents many original grants, and many confirmations of original grants, before the appearance of a single instance of a Resignation-charter. In short, the charter of Resignation is second in seniority to the charter of Confirmation.

The earliest Deeds of any kind with which we are acquainted were charters of donation by kings and noblemen to monastic establishments for pious uses. These, according to early usage, were ratified or confirmed by the heirs or successors of the first donors, and often, also, by the successors for more than one generation of those by whom they were first confirmed. In the Registrum de Dunfermelyn, we find the original grants of David I and his predecessors to that monastery confirmed successively in a public and solemn manner by his successors, Malcolm IV, William the Lion, Alexander II, and Alexander III—the clergy and laity acquiescing—and this long before the kings of Scotland were accustomed, on their accession, to revoke, *jure coronæ*, the grants of their predecessors. The original Deeds next in the order of time were donations or grants to near relations, or to adherents of a lower rank, ready to render feudal homage and service. Everything of the kind was, according to ancient usage, occasionally revived or renovated by repeated confirmations.

The purpose of the ancient charter of confirmation of either kingdom seems to have been to authenticate, and to strengthen or make firm and sure, an original donation or sale. The confirmation may have been granted by the king as the para-

mount superior of all the lands within his kingdom; or by the Crown vassal within whose territory (or fee) the lands lay; or by the bishop of the diocese, or the abbot or other chief prelate of the district, if the Church had any interest in the matter; or by the heir or successor of the original granter; or by any third party anywise concerned. The rights of subordinate proprietors must then have been very precarious and little understood. In the preliminary dissertation to Madox's compilation, intituled: Formulare Anglicanum, it is remarked (p. xix.), that in England "in the early times after the Con-"quest, we meet with so many confirmations successively made "to the same persons, or their heirs or successors, of the same "lands and possessions, that it looks as if men did not then "think themselves secure in their possessions against the king, "or other great lords who were their feoffers, or in whose fees "their lands lay, unless they had repeated confirmations from "the king, or his heirs or successors, or the other great lords "or their heirs"—he might have said, "that it looks as if on "every change, either on the side of the superior or on that "of the vassal, a new confirmation was absolutely necessary "for the security of the party having right to the possession "for the time being."

The confirmation introduced into Scottish practice at a somewhat later period, was another kind of Deed. It was granted by the immediate superior of the feudal right, on the occasion of any transference made by the vassal,—to the effect of receiving the donee or purchaser as vassal in the donor or seller's stead. This kind of confirmation, always strictly peculiar to Scotland, might have been termed a charter of Reception, or a charter of Adoption, whereas the kind first in use was just a charter of Approbation.

That the most ancient practice was the same in both countries may be seen, or illustrated, from the following examples:—

About the year 1150, Walter, the Bishop of Coventry, gave and granted the mill of Lea to William, a baker, and his heirs, for his or their service, besides paying two shillings yearly,

and grinding as should be requisite for the bishop's table at Tachelsbroc.—*Form. Angl.* No. 287.

After the bishop's death, Theobald, Archbishop of Canterbury, holding firm that donation, confirmed it. — *Idem*, No. 70.

Subsequently King Henry II confirmed the mill to the Baker, to be held freely and quietly, honorably, entirely and fully, as the charter of the foresaid bishop testifies to him, and likeas Theobald, Archbishop of Canterbury, confirmed the said mill to the baker and his heirs.—*Idem*, No. 80.

And thereafter Bishop Richard, Walter's immediate successor, granted the mill to the same William the Baker, as his predecessor had given and confirmed it, and for the same service as expressed in Bishop Walter's charter. — *Idem*, No. 81.

In 1181, the Baker sold the mill to the convent of Bordesley, for a life-annuity of twenty-four quarters, half wheat and half some other kind of grain.—*Idem*, No. 139.

This transaction was not confirmed—monastic establishments being then in great favor, and highly privileged.

On the other hand, we find from the Register of the Bishopric of Aberdeen (p. 13), that Bishop Mathew, about the year 1190, made a feudal grant to William Tatnell, of two carrucates of land, which David, Earl of Huntingdon, younger brother of King William, had bestowed on the cathedral church of Aberdeen—Reddendo by Tatnell to the bishop and his successors, a pound weight of incense and a merk of silver. This grant was confirmed by the King himself, seemingly as a matter of course; and, after the lapse of many years, the same two carrucates were confirmed or re-granted, 22d January 1276-7, by Bishop Hugh (No. 277) to William Tatnell, grandson of the first vassal. On this occasion the original Reddendo was changed into two merks, payable the one at Whitsunday and the other at Martinmas—and the Re-grant was confirmed on 6th February same year (No. 34), by the dean and chapter of the diocese—and lastly, on 27th August 1297, Bishop Henry (No. 37) confirmed a sale of these lands

by the said William Tatnell, the grandson, to Patrick of Rothnek. The bishop calls the sale an infeudation and sale; but it evidently was not a subinfeudation—for, as appears from the confirmation, the only Reddendo laid upon Rothnek was that he should make payment to the bishop and his successors of the two merks yearly, the one at Whitsunday, and the other at Martinmas, which Tatnell the seller had been accustomed to pay.

Of all the specimens yet noticed, this last the most nearly resembles the proper confirmation-charter of Scottish practice. Bishop Henry thereby plainly adopted the purchaser as his immediate vassal, in room of the seller and his predecessors.

But the truth is, that in the ancient confirmation-charter, the Deed thereby confirmed is often so indistinctly described, that it is impossible to tell whether it was a sub-infeudation or a pure transference, or to discover the reason why it was confirmed.

The oldest charter of Confirmation of any kind, to be found in any Scottish publication, if we except those in favor of monastic establishments, is one by Henry, Earl of Northumberland, only son of King David I, in favor of Lady Beatrice of Bello Campo, whose husband, Hugh Morville, was a great benefactor to, if not also the original founder of, the Abbey of Dryburgh. She may have been considered the King's vassal whilst the prince was under age, and possibly the first grant was obtained from David himself, as king or as administrator-in-law for his son.

[*Circa* 1150.]

Earl Henry, son of the King of Scotland, To the Bishops, Abbots, Justiciaries, Barons, Sheriffs, Public Officers, and all good men of his whole land, French and English, as well future as present, Greeting. Know ye that I have granted, and by this present writing confirmed to Lady Beatrice of Beauchamp, her lands and tenures of Roxburgh, which she held of my father. Moreover, I will and command that she shall hold and possess these lands and

tenures of me, freely and honorably, as she held them most freely and quietly of my father.—*Liber de Dryburgh*, No. 145.

The following by King Alexander II is a confirmation of a different kind, and is perhaps one of the oldest of the kind to be found in print. It evidently relates to a subinfeudation, for the donation confirmed was a donation for homage and service, and to be holden directly of the donor. The King's charter, it will be observed, contains a reservation of the service due to himself, implying that Alan, his constable, should continue liable for the same amount of feudal service, as he used to render as Crown vassal, before granting the subinfeudation.

[31*st May* 1226.]

Alexander Dei gratia Rex Scottorum, Omnibus probis hominibus totius terræ suæ, clericis et laicis, Salutem. Sciant præsentis et futuri nos concessisse, et hac carta nostra confirmasse, donationem illam quam Alanus filius Rollandi, constabularius noster, fecit Hugoni de Crauford, pro homagio et servitio suo, de terra de Monoch, per rectas divisas suas, contentas in carta ipsius Alani filii Rollandi: Tenend. et habend. prædicto Hugoni et hæredibus suis, de prædicto Alano et hæredibus suis, cum omnibus justis pertinentiis et aisiamentis et libertatibus suis, ita libere et quiete, plenarie et honorifice, sicut carta prædicti Alani filii Rollandi inde facta prædicto Hugoni juste testatur, salvo servitio nostro. Testibus Thoma de Galweia comite Athol, &c. Apud Cadihou [Hamilton] ultimo die Maii anno regni nostri duodecimo.—*Dipl. Scotiæ, plate* 33.

Many of the ancient writings with which I hope to make the reader acquainted, are far from being so very easily read and understood as the above. I beg, therefore, here to notify, that when I shall have occasion to quote any ancient Latin document already in print, I shall take the liberty of abiding by the plan of the literal version, unless where there may appear good reason to the contrary. This, I humbly apprehend, cannot be displeasing to any reader, seeing that those who are desirous of examining any of the originals have only to turn to the sources to which reference will be made.

Confirmation-charters by subject-superiors were constructed

according to the same model as that used by the Crown—the only difference being that the address or salutation was usually less lofty. A confirmation like the one last noticed, whereby the superior just confirmed his vassal's donation or alienation, to be holden as freely, &c., as set forth in his vassal's charter, was styled a confirmation in the lesser form; but in the larger form the deed confirmed was narrated at full length, or transcribed verbatim into the confirmation-charter—a practice which began about the year 1360, and, though it never became general, was kept up less or more till a comparatively late period. I have seen a Crown-charter of confirmation, dated so recently as 17th November 1632, containing full transcripts of two deeds thereby confirmed. But perhaps it will be better to defer any further remarks on the confirmation-charter till we come to handle examples of these and other Deeds in the order of time.

There is just one other fact I should like to notice here, before closing this chapter, and that is that there was another kind of confirmation long prevalent in Scotland, and only discontinued in consequence of the more enlightened and independent views that began to be entertained by the legal profession at large, soon after the abolition of ward-holding. Till then it was a frequent practice with cautious men of business to get an original subinfeudation, of whatever kind, confirmed so soon as granted, by the granter's own superior, in order to protect the sub-vassal against the granter's feudal delinquencies; but happily Upper Confirmations are now altogether unnecessary. There is now no kind of confirmation known in practice, except that of the immediate superior of the vassalage; and its purpose, as already explained, is simply the reception of the last acquirer as the said immediate superior's proper vassal, in room of the original, or of the last-entered vassal. It is also not undeserving of remark, that all manner of confirmation has for many ages disappeared from English practice.

CHAPTER III.

THE CHARTER OF RESIGNATION.

RESIGNATION, or Surrender, according to most ancient practice, was usually made by the vassal *propriis manibus;* and, whether made in that manner, or by his procurators in his name, it was a total surrender, absolute and unconditional, —as if the resigner had no right to impose any conditions on his superior, but that the latter might keep the lands to himself, or at his own good time and pleasure confer them on any party he might think proper; and as if the new grantee should be made to understand that he was nowise beholden to the resigner, but solely to the superior. We may find in our archives many instances of new grants long after the resignation, and without any reference thereto; or, if the superior thought fit to refer to the resignation, he seemingly did so, not as his warrant, but as if to identify the lands in the new grant, or as if he deemed it a fact not unworthy of notice that they had previously belonged to the party resigner.

The following is a genuine and very early instance of a new Grant immediately after resignation. It relates to the lands of Hailes, within the county of Edinburgh, then held of the abbot and convent of Dunfermline. But although churchmen were the first to set the example of liberality and independence, and although on this occasion it was obviously the resigner's purpose that a new Grant should be made in favor of a party whose money he had received, yet the abbot and convent had not the boldness to state explicitly that the

lands had been so resigned that they might be so conferred :—

[*Circa* 1190.]

Archibald, by the grace of God, Abbot of the Church of Christ of Dunfermelyn, and the whole convent of same place, To all Sons of Holy Mother Church, Greeting. Be it known to all, both present and to come, that Archibald, the son of William of Douglas, voluntarily with advice and consent of his friends, and for the money which Thomas, the son of Edward of Restalrig and his friends gave to the same Archibald, surrendered in our full chapter, for himself and his heirs, the land of Hailes, which he held of us, and delivered up into our hands the charters thereof in his possession, with every right which in that land he had or could have : Be it also known to present and future, that after the said surrender we have given and granted, and by this our charter confirmed, to Thomas, the son of Edward of Restalrig, the foresaid land of Hailes, by its right marches, and with all its just pertinents : To be holden and to hold to him and his heirs, of us and our house, in fee and heritage, in lands and waters, in pools and mills, and in all other things justly pertaining to the foresaid land, freely and quietly, exempt from all service, exaction, and custom : Rendering therefor to us and our house year by year, six merks of silver, three to wit at Martinmas, and three at Whitsunday, and performing the forinsec service which appertains to that land, &c.—*Reg. de Dunf.* No. 300.

The following seems a fair specimen of the Resignation-charter, in the time of King Robert the Bruce :—

[*Year* 1318.]

Robert, by the Grace of God, &c. Know ye that We have given, granted, and by our present charter confirmed, to our beloved and faithful Alexander Stewart, knight, for his homage and service, the whole land of Kimmergham, with the pertinents, which Thomas of Morham, senior, knight, lately at Dunse Park, in presence of our grandees, to us by staff and baton, surrendered and resigned, and he of pure free will and of his own accord, for himself and his heirs, wholly renounced for ever, all the right and claim which he had or could have in that same land : To be holden and

to hold to the said Alexander and his heirs, of us and our heirs, in fee and heritage, by all its right meiths and marches, in free barony, as freely, quietly, fully, and honorably, with all its liberties, commodities, easements, and just pertinents, as the foresaid Thomas at any time held or possessed the said land of Kimmergham, with the pertinents: Performing therefor to us and our heirs, the said Alexander and his heirs, the service of one knight, without any attendance to be given for the said land, at our court of Berwick. In testimony whereof, &c.—*Reg. Mag. Sig.* No. 5.

According to the ancient practice, of Scotland to wit, which we are now considering, the resigner was held to be completely divested the instant resignation was made, and all the right he ever had instantly reverted to the superior; but, according to modern ideas, a vassal who resigns *in favorem* is not understood to be divested till a new charter has been granted in favor of the party for whose behoof the resignation was made, and till sasine on the new charter has been written out and sent to the Record.

In modern practice every charter of Resignation requires a written procuratory *in favorem* as its warrant, and the consequent entry by Resignation-charter and Sasine, is, for the reason already noticed, justly reckoned more satisfactory than by confirmation. But procuratories of resignation *in favorem* could not have made their appearance till a considerable degree of freedom in the commerce of land had been generally recognised in Scotland. In point of fact, ages elapsed before any consistent and uniform practice was established in regard either to resignation or to confirmation. The following instance may serve to show that even so late as 1473, our ancestors were not governed by any fixed rule. On 29th July of that year, George, the second Earl of Huntly, granted the barony of Panbride, in the county of Forfar, to Walter Ogilvy of Oures, by an alienation-charter, to be holden *de supremo domino nostro Rege* (namely, King James III) *et suis successoribus, in feodo et hæreditate in perpetuum*—performing to the said sovereign lord *servitia debita et consueta*. Next day the Earl granted a Deed of Resignation, addressed to the

King, bearing that he resigned all right to the said barony in his majesty's hands, *in favor of the said Walter Ogilvy;* yet the King did not grant Ogilvy a charter of Resignation—he confirmed at full length the Earl's alienation-charter.

As the Earl held the baron yof the Crown by ward-holding, he would have acted very imprudently had he attempted to carry through a sale without first ascertaining that the King would receive Ogilvy as his vassal, and possibly the Deed of Resignation was granted for that very purpose; but the case clearly shows that it was all one to Ogilvy whether he was received by resignation or by confirmation, and that the confirmation-investiture and the resignation-investiture were then as they still are of equal avail. The idea of also expeding a resignation-charter by the Crown, could never have occurred either to Ogilvy the purchaser, or to the officers of his Majesty's chancery—one perfect investiture being in all cases abundantly sufficient. And, even had Ogilvy obtained two charters, the one of Resignation and the other of Confirmation, these would not have corresponded to the two charters and distinct manners of holding mentioned in the formal obligation to infeft, which was not invented till about seventy years afterwards. The circumstances had not then occurred which gave rise to such obligation, or to the practice of two charters (of Alienation to wit) being granted not by the seller's superior, but by the seller himself, the one to be holden of the seller temporarily, or so long as might be agreeable to the seller's superior, and the other to be holden of such superior permanently, when received by him as his proper vassal in the seller's stead.

CHAPTER IV.

WARD-HOLDING.

THIS, the most ancient feudal tenure, was a purely military compact, and was termed Ward-holding from its most prominent feature, that the feudal grant returned to the granter or superior, on the death of the grantee, and remained with him until the grantee's heir was able and willing to perform the duties of a vassal, till which time, if the heir was in minority, the superior had the guardianship of his person and estate. In the time of King Robert the Bruce, almost all the lands in Scotland, excepting those dedicated to the Church, or to pious uses, were held ward—the military habits of the crown-vassals, and their dependants, disposing them to be negligent of tillage and agricultural improvements. At that period few of the laity could read or write.

According to the feudal system, as adopted by our ancestors, all titles to lands are understood to have been originally derived from, and to be held under, the crown, either directly or through the medium of a subordinate right; and all subordinate rights, even the lowest, are traceable by a regular chain of connexion upwards to the crown—as if at some remote period beyond research, all the lands of Scotland had belonged in property to the crown, and had been distributed among the grandees in large allotments,—had been by them subdivided among their principal adherents, and by them again parcelled out among inferiors,—the sole connecting link that bound all together, being, that every liegeman owed to his immediate superior feudal homage and service. At first

there could be no idea of such casualties as ward relief and marriage being comprehended in military service, seeing that the first feudal grants, of which we have any knowledge, were made for the lifetime only of the grantee. These casualties arose subsequently, and in consequence of the extension of the right to *heirs*, who, owing to the natural severity of the system, could only be admitted when grown up to manhood, and able to perform the requisite feudal service.

The feudal system had its origin in a very remote age among warlike tribes upon the continent of Europe, but was not observed in the same manner in every country in which it appeared. It had attained full maturity, and been in full activity in France and elsewhere on the Continent, more than two centuries before the Norman Conquest. It must have been little known in South Britain before that event, and still less so in Scotland. After all that has been written on the subject, it is still uncertain at what precise period the system began to find its way into Scotland; but so far as we have any means of judging, it must have crept in gradually and imperceptibly, and may have been partially acted upon before our ancestors began to make use of written titles. When Malcolm III, about the year 1074, conferred the castle of Dunbar and lands in the neighbourhood on Gospatrick of Northumberland, he must have done so on the express condition that the grantee should have right to hold them only so long as he preserved his allegiance to the donor. I reckon that donation to have been a pure feudal grant, and to be the oldest of which we have any knowledge; and yet I have no doubt that it was just made orally without any writing whatever.

In some countries (Norway for instance) a proprietor of lands holds them without any written title, and without any idea of superiority or vassalage, as absolutely and independently as any man in this country may possess his household goods, or any article of moveable property, belonging to him. Lands so held are termed udal or allodial. The whole lands in Orkney and Zetland were originally so held, but the feudal system has encroached upon them and produced many

changes in that respect; for, if once resigned and possessed on feudal titles, they can never again become allodial.

Ward-holding was long the only feudal tenure with which our ancestors were acquainted, and was not superseded by the introduction of the more favorable tenures of blench-holding and feufarm-holding. In old charters, these are the indubitable signs of ward-holding: first, that the lands are granted for homage and service, "*pro homagio et servitio suo mihi (vel nobis) impenso et impendendo;*" secondly, that the tenendas is usually *immediate de me* (or *de nobis*) *in "feodo et hæreditate;"* and, thirdly, that the Reddendo is thus, or usually thus expressed: "*Reddendo inde annuatim nobis et hæredibus nostris servitia debita et consueta.*" But some instances may be observed, in early ages, of lands granted to be holden blench of the granter and ward of the crown.

Blench-holding, the most favorable tenure, had its origin in lands having occasionally been bestowed as a reward for some signal service, so important as to merit exemption from all future service. Still the distinction of superior and vassal was kept up; but in place of homage and service as to a master, the vassal was to show personal attachment as to a protecting friend. The marks of an original blench-charter are various, but something like the following: first, the consideration, *pro fidelitate sua mihi facta et in futurum facienda;* secondly, the tenendas, *de me et hæredibus meis in alba firma feodo et hæreditate;* and, thirdly, the yearly payment of a penny, or yearly present of a rose, or a pair of gloves, or a pound of wax, or some such small matter, in token of respect, on the ground of the land, if asked only.

Feufarm-holding originated in times of peace, and in a somewhat improved state of society, when superiors began to discover and properly to estimate the happy consequences resulting to themselves from giving due encouragement to the peaceable and industrious cultivators of the soil. The practice of feuing for a yearly return in money or farm-produce, was first introduced, not by any express law, but by the gradually improving state of society.

In all of these tenures, the vassals, unless expressly exempted, were subject to the jurisdiction of their immediate superiors, and bound to appear personally, or, as the phrase was, to give suit and presence in their courts, especially at the three yearly head-courts, anciently common to all civil and criminal jurisdictions within Scotland, and held respectively on the days next after Easter, Michaelmas, and Christmas. All Crown vassals had both a civil and a criminal jurisdiction within their own territories; but were themselves bound to give attendance at the Sheriff-court of the county within which their lands lay. Even the vassal of a Crown vassal had jurisdiction, if he held his lands *cum curiis*. In all cases, the extent of the jurisdiction depended on whether the lands were or were not erected into a barony, or expressly held with the privileges of a barony, or *cum fossa et furca*, &c.; but in no case did the criminal jurisdiction of any subject-superior extend to high treason, or to any of the four great crimes, called the pleas of the crown, namely, robbery, rape, murder, and wilful fire-raising.

Suit and presence, or personal attendance in the superior's courts, either on the vassal's own account as claimant or defendant, or to assist in determining disputes or differences among his co-vassals, may not have been reckoned an irksome duty; and following his superior in his hostings and huntings, may, in a rude age, have been considered a privilege rather than a burden—in point of fact, it was universally reckoned an honor, to which species of honor the old feudal grant expressly pointed, when it bore that the lands were to be held of the granter "libere et *honorifice*," &c. And even if any of the obligations incumbent on the vassal had been reckoned burdensome, expediency led in time to a gradual relaxation in their performance. Personal attendance, which fortuitous circumstances might sometimes render inconvenient, came in time to be given in the court by proxy, and in the field by deputy. The proper feudal service, too, was never strained against the vassal beyond certain fixed limits settled by usage—thus, no vassal was bound to follow

his overlord to the field by himself or his deputy, at his own expense, longer than forty days in the year; and if the vassal in a £10 land was bound to furnish a mounted archer for forty days, the vassal in a £5 land was only liable in the like burden for half that time.

But the casualties of Ward relief and marriage, inherent in military holding, must have been often productive of great cruelty and oppression.

Of these, Relief was the least burdensome—being generally reckoned a year's rent or value of the ward-lands, payable to the superior, for receiving the heir of a deceased vassal as vassal in the ancestor's stead. By that payment the heir *relieved* the feu out of the superior's hands, into which it was understood to have fallen by the late vassal's decease. It was well for the heir if he had attained majority before the ancestor's death, for in that case he was not subject to ward, and was at once entitled so to redeem his inheritance. If the ward-lands were held of the Crown, the year's rent was computed favorably for the heir, the new extent specified in the retour of his service being always accepted in lieu of the real rent. It is not worth while to say more on the present head, than that *relief* is still a recognised casualty in feufarm-holding, where an heir on being received by the superior has to make payment of one year's feu-duty, over and above all arrears that may be then due. Even in blench-holding the superior, when entering an heir, may, if he thinks proper, exact two years' blench-duty (which is not always inconsiderable), one for the then current year, and the other in name of relief; but blench-duty being only payable once a year, *si petatur*, he cannot claim any arrear.

The casualty of marriage was an odious exaction, which the superior of ward-lands was permitted to extort from the heir of his deceased vassal, on or after attaining the age at which he or she might lawfully contract marriage. In the case of a male heir, it was understood to be such a sum as he on contracting a suitable marriage would have been entitled to expect in name of tocher. Anciently this, which was called

the *single avail*, was variously estimated, but latterly it was held to be a sum equal to two years' free revenue, not merely of the ward-lands, but of the whole of the ancestor's heritage to which the heir had succeeded. If the deceased left different lands held of more than one superior, the casualty was only due to the eldest, that is, to him from whose ancestor the vassal's ancestor had obtained the first feudal grant of lands to be holden ward; but if the deceased held any of his ward-lands immediately of the Crown, all other superiors were excluded. When claimed by a donator of the Crown, or by the subject-superior entitled to it, the heir, unless married before the ancestor's death, or unless still within the years of pupillarity, could not stave off the claim, on the ground that he was still in minority, and had no means of his own wherewith to satisfy the casualty, or that he was not contemplating matrimony, or knew of no suitable match. The superior was entitled to select and offer him what *he* considered a suitable match—the only recognised test of its suitableness being whether it could or could not be accepted without disparagement. If accepted, the superior paid himself out of the lady's fortune, or retained the ward-lands till satisfied. If the heir persisted in refusing the match offered, after being required by the superior under form of Notarial Instrument to treat regarding it, or if in the face of the offer he put it out of his power to comply by contracting marriage elsewhere, the superior became entitled to the *double avail*, regarding which, see Erskine, II. v. 21.

A case indicating a state of manners not over-refined, occurred *before the Lords' Auditors for Causes and Complaints*, (or judicial committee of the ancient Scottish Parliament,) on 3d July 1483, more than fifty years before the institution of the College of Justice. It was this: Margaret Lady Dirlton having obtained from the Crown a gift of the marriage of Alexander Lord Forbes, offered him her own daughter Margaret Ker, as a suitable match, and by letters of legal diligence commanded and charged him to marry her,—"the "quhilk was na disparissing to him;" but he having declined

the honor and actually married another, she or her prolocutor came before their Lordships, and claimed 2000 merks as double avail. The Lords decerned that Lord Forbes was liable for the double avail, but that Lady Dirlton must first instruct the single avail in form of law—and, having afterwards succeeded in proving the single avail to be 1000 merks, she, on 13th October same year, obtained decree in terms of her claim.

Had this Lord Forbes been married in his father's lifetime, he would not have been liable to any such claim; for it is a singular fact, and must have led to many a hasty and ill-judged connexion, that the superior could not claim the casualty if the heir had been married in his predecessor's lifetime, even though he had become a widower before the succession opened to him. Regarding female heirs, I shall only remark that the superior's right of disposing of them in marriage must have often occasioned even greater anguish than in the case of male heirs.

If the casualty of marriage was odious and oppressive, still more so, when it occurred, was that other casualty which gave to the tenure by military service the more familiar name of Ward-holding. When a vassal died, leaving a minor heir, the lands, which immediately on the death had reverted to the superior, remained with him in the case of a male heir till he attained majority, and in the case of a female heir till she attained the age of fourteen years complete. Meantime the rights of the late vassal's tenants and sub-vassals fell into abeyance, unless previously and separately confirmed or homologated by the superior, who, if he thought fit, might remove them from the lands, and whilst the ward lasted give the right of possession to whomsoever he pleased. During the same period the superior had also the guardianship of the heir's person, and the direction of his or her maintenance and education—being in a great measure amenable to no law, and subject to no controlling power, save perhaps the hazard of provoking the hostility of his other vassals. Little or nothing was done by the Scottish Parliament whilst it existed, towards

abridging or setting bounds to the prerogatives of superiors; but yet the severity of feudal usages gradually yielded in some small degree to the gradually improving state of society. At length, the hasty outbreak of the Earl of Mar in 1715, led to the abolition of personal services, and the rebellion of 1745 to the abolition of ward-holding and of heritable jurisdictions.

It would be a great mistake to suppose that because the wardship of an heiress terminated seven years sooner than that of a male heir, the former was by the feudal law more favorably regarded than the latter. A female ward could not have attempted to resist her superior's power of disposing of her in marriage, except at the expense of her whole yearly revenue,—and even supposing that she, being marriageable at twelve, had been clothed with a husband in her father's lifetime, and before the succession had opened to her, the superior, unless he had been a consenter to the marriage, was not bound to receive such husband as his vassal, except on his own terms. In short, the superior's prerogatives were such as that in every case of female wardship he could easily compensate himself for its being nominally of shorter duration than the wardship of a male heir.

If a Ward *Sub-vassal*, subject to the ordinary casualties, was unprotected by the higher superior's confirmation against the consequence of his immediate superior's fee falling under Ward, his tenure was termed *Black Ward*, or *Ward upon Ward*, and must have been a very precarious title.

Taxed Ward, the mildest species of Ward, where, out of favor to the vassal, the casualties of Ward Relief and Marriage were permanently restricted to certain definite sums, often very moderate, was chiefly distinguished from *Pure Ward* or *Simple Ward* in this respect, that instead of the lands returning to and remaining with the superior during a minority, the minor's nearest kinsman of full age on the father's side, or such other person as by the father's nomination or otherwise was entitled to the office of legal guardian, was allowed to manage the lands for the minor's behoof, on

condition of paying to the superior, during the minority, the yearly estimate fixed by the charter, often less than a tenth part of the yearly avail of the lands. With like lenity, the Relief was usually fixed at the same amount as one of these yearly payments, and the Marriage at four, five, or six times that amount. Before the abolition of Ward-holding, the barony of Kelly or Ochterlony in the county of Forfar, anciently reckoned a £20 land of old extent, was held taxed-ward of the Crown—the taxed-ward duties being (1.) £160 Scots, or £13, 6s. 8d. sterling, yearly, during the time of Ward (that is, during those years when but for this commutation a minor heir would have been under ward), payable by equal moieties at Whitsunday and Martinmas; (2.) the like sum of £160 Scots for the casualty of Relief when exigible; and (3.) £800 Scots, as the taxed value of the casualty of marriage, when the superior should happen to be entitled thereto—that is to say, a bachelor heir, on making payment of a sum equal to £66, 13s. 4d. sterling, to the Crown's donator, was free to marry according to his own inclination, or to remain all his lifetime unmarried.

In the Second Edition of the Juridical Styles [1811, page 5] the following passage occurs:—

"As civilisation advanced, the necessity for personal service in the field diminished. Between many superiors and vassals, therefore, it was covenanted that personal service should be commuted for a stated payment in money; which, coming in place of the knight's service or ward, was styled *Taxed-ward.*"

For reasons unnecessary to be mentioned, I would gladly have passed the above without notice, but that I find it and other erroneous statements repeated *verbatim* in the Third and Fourth Editions. In that short passage the distinction between casualties and personal services is overlooked—the tenure by knight's service, and the casualty of ward, are supposed to be one and the same—and it is most erroneously stated, that personal service in the field was frequently commuted for a stated payment in money, and that such payment or commutation was styled *Taxed-ward.*

The *casualties* of Ward-holding, which, when favorably estimated and restricted, led to the use of the term *Taxed-ward*, were *not personal services at all.* The only personal service anciently proper to Ward-holding was, if the lands were held of the Crown, personal attendance with suitable armour for the legal period in the royal army; and, if held of a subject-superior, the like attendance in the retinue of such superior in any of his military expeditions, whether following the royal army or otherwise. That species of service, which must have been seldom exacted during the long and comparatively peaceful reign of Alexander III, but may have been occasionally exacted with considerable strictness in some later ages, *never was commuted*, but gradually fell into disuse. Our sovereigns latterly found from experience that they could best attain their own purposes by employing hired soldiers, and their great vassals were taught by positive enactments, that they could not be allowed to make hostile invasions on each other, or to travel from place to place with retinues of armed men.

The ancient feudal tenure for homage and military service was never known in England by the term *ward-holding*, nor in Scotland, except perhaps at a very remote period, by the term *knight's-service*. With us the quantum of such service anciently exigible from an estate must have been little regarded after the general survey and valuation, supposed by the late Mr. Thomas Thomson to have been made prior to the time of Alexander III. On that occasion, the lands of Scotland, or at least those then held immediately of the Crown, were estimated not according to the quantity of knight's-service then exigible from them, but according to their yearly worth in the money of that age. Aids and taxations were at different times afterwards levied by our kings, according to the monied proportions so ascertained, now termed the Old Extent. On the subject at large, the reader is respectfully referred to Mr. Thomson's valuable memorial (6th Jan. 1816) in the case, Cranstoun against Gibson.

In England, on the other hand, where the term knight's-

service was much longer retained, aids and taxations were anciently levied from landed proprietors, according to the number of knights' fees comprehended or included in their respective estates. For example, as appears from Madox's History of the English Exchequer, King Henry II on one occasion levied twenty shillings, and on another two merks on each knight's fee,—so that the proprietor of an estate extending to ten knights' fees had to pay on the first occasion a tax of £10; and on the second, a tax of £13, 6s. 8d.

In Scotland, ward-vassals, even after military service had ceased to be exacted, were, from the nature of their holding, entitled to exemption from all other service, except suit and presence in their superior's court. Even from this almost all the great Crown vassals, and many considerable sub-vassals, were expressly exempted by their original charters. The Feufarm and Blenchfarm vassals of some noblemen were, by express stipulation, or the usage of the district, liable for predial and menial services; and some were bound to follow their superiors to huntings and hostings, or clannish musters called in some districts Highland gatherings. All such minor personal services were virtually suppressed by the Act, 1st George I, chapter 54 (year 1715), having been thereby ordered to be changed into annual money payments, at suitable rates, as might be agreed upon between the superiors and their vassals, or awarded by arbiters, or, if necessary, by the Court of Session. Ward-vassals, though they might occasionally of their own accord appear at hostings and huntings, were not bound to do so, or to perform any menial service. Accordingly, no transaction in relation to the Statute took place between any ward-vassal and his superior. Such vassal still remained ostensibly bound by his title-deeds to render *servitum debitum et consuetum;* but by these words nothing more was understood than that he held his lands subject to the ordinary casualties of ward-holding.

In Anderson's Diplomata Scotiæ, the reader may see *facsimiles* of several original charters granted in the time of Malcolm IV, and William the Lion (transcribed into volume

first of the Acts of Parliament), wherein the grantees were taken bound to render knight's-service, *servitium unius militis*, or *servitium dimidii militis*, or *quartæ partis unius militis*. Among these, there is one in favour of Walter, the first High Steward of Scotland, whereby he was actually bound to render *servitium quinque militum*. The tenure for military service, there can be no reason to doubt, was the only tenure then known in England or Scotland, except for lands bestowed on the church for pious uses. Doubtless also our ancestors, in the infancy among them of written titles, adopted the forms and expressions of their neighbours of England; but the forms of both countries, especially as regards tenures, have now so long and so widely departed from each other, as to have lost all traceable resemblance. In England, by the Statute, 12th Charles II, chapter 24 (year 1660), complete relief was given at once by the total abolition of all tenures by knight's-service, and of all wardships, values, and forfeitures of marriages, fines for alienations, and charges incident to wardship. The British Statute applicable to Scotland, 20th Geo. II, chapter 50, completed what had been begun, and only in a small measure accomplished in 1715. Ward-holding was thereby for ever abolished, and converted in the case of lands held ward of the Crown into blench-holding, and in the case of lands held ward of any subject-superior into feu-holding, for payment of a certain feu-duty, as the value of the casualties. By the Act of Sederunt, 8th February 1749, passed by the Court of Session for settling the rates of feu-duty, their Lordships enacted and declared, that for all lands held in simple ward of any subject-superior, there should be paid, in satisfaction of the casualty of marriage, a yearly feu-duty of one per cent of the rent, as on 25th March 1748, deducting a fifth for teinds, where the same were not held ward of the subject-superior; and that there should be paid a further feu-duty of one per cent of the rent, in satisfaction of all the other casualties—Provided always, that if the ward-vassal held other lands ward of the Crown or Prince, he should not be liable to the subject-superior for any feu-

duty as the value of the marriage,—and that for lands held taxed-ward of a subject-superior there should be paid, as the value of the whole casualties, a yearly sum, in name of feu-duty, equal to two per cent of the sum taxed by the charters, as the yearly value of the casualty of ward when due.

It was another peculiarity of ward-holding, that if the vassal alienated more than the half of the lands so held, without first obtaining the superior's consent, he forfeited the whole. The lands were understood to have been originally bestowed out of personal favor, and as a remuneration for services undertaken to be performed. If the vassal sold or gave them away, he was understood to have impoverished and rendered himself unable to perform what he had undertaken; and to do so without leave, as it betokened a thankless and rebellious spirit, was deemed a feudal delinquency inferring no less a penalty than entire forfeiture. In some law books this peculiarity has been termed the casualty of Recognition; the superior, when the fact was manifest, being entitled to recognosce or recognise as his own, and to resume to himself the original grant. But, in the first place, the term Recognition was not confined to the forfeiture of ward-lands for alienation without leave—it applied to forfeiture of any lands for any sufficient cause, and whether such lands had been held ward, or in blenchfarm, or in feufarm; and secondly, if in other places a casualty signifies a chance-benefit, or a benefit occasionally accruing to a superior, without any fault of his vassal, it cannot be a proper term for the highest feudal penalty—forfeiture or annihilation of the feuright.

Ward-holding was inimical to all manner of alienation, or to the substitution of one vassal for another; yet a ward-vassal, if his lands were sufficiently extensive, might have granted subinfeudations of portions to be holden of himself by the same kind of tenure,—as these when judiciously made would have strengthened rather than impaired his ability to perform feudal services to his own superior; he might even have made sales of considerable portions, provided he always retained in his own hands the full half of his original feu. But all such

acts, unless sanctioned by the superior at the time, fell under the ward when it occurred, and were all alike exposed to absolute forfeiture, in case the vassal had at any thereafter made another alienation which, if added to those previously made, left him in possession of less than the half. However absurd such legal aphorisms may now appear, nothing can be more certain than that they were acted upon, for more than two hundred years after military service had ceased to be exacted. Large and small estates holden ward, were occasionally forfeited to the immediate superiors for visionary acts of ingratitude, up to the date of passing the before-mentioned excellent Statute of 20th George II, whereby Ward-holding was for ever abolished with all its cruel grievances.

CHAPTER V.

PUBLIC INVESTITURE AND BASE INVESTITURE.

THESE terms are strictly peculiar to Scottish Conveyancing; yet, although now so familiar to us, they were unknown to our ancestors, in the sense now attached to them, till about the middle of the sixteenth century, that is, upwards of a century after the introduction of the Notarial Instrument of Sasine. It is no doubt true, that so early as October 1478, we find mention of a base-fee, or, as it was then called, a bass-fee. On the 12th of that month the Lords of Council ordained John of Dalrymple, even before he was entered with his own superior, who was then in minority, to infeft Christian Grierson in the bass-fee of a portion of his estate held of him by her in tenandry; and on the 16th of the same month, in a question between the Crown and Henry Melville, who maintained that his tenandry holden by him of Agnes Melville, a Crown vassal, had not fallen in ward to the Crown by her death, although her heir was in minority, because the liferent of her estates belonged by law to Robert Ross, her surviving husband,—the Lords in effect held that the possession of Ross, by virtue of his right of courtesy being without sasine, did not constitute him the liferent superior of said tenandry, that he had only by privilege the usufruct of his deceased wife's estates, and had no manner of fee in them, neither *right heritage* nor *bass-fee*.*—[*Acta Dominorum Con-*

* This may serve to elucidate the maxim of our law, that a bare liferenter cannot give a valid infeftment, and to show that strictly speaking the maxim can only apply to such liferenters as are not themselves infeft.

cilii, pp. 8, 13.] But as the term *public investiture* was entirely unknown till many years afterwards, the meaning attached to *Bass-fee* in 1478, must have been different from what we now understand by a base fee or a base right, as contradistinguished from a public right. By the bass-fee the Lords of Council must have meant the right to the *dominium utile* as held in sub-vassalage; but if a sub-vassal's investiture be complete, we are accustomed to call it a public investiture, however low in the scale, just the same as if held immediately of the Crown; whereas a base investiture is an imperfect subordinate investiture, which, however, may be capable of being elevated by confirmation to the rank of a public investiture.

When a baron made an original grant in favor of an adherent, and when, in terms of his precept of sasine, whether separate from or according to later practice subjoined to the charter, the grantee was accompanied to the ground, and in open face of day, in presence of a host of witnesses, placed in the natural possession—the investiture so given was of course a public investiture.

In like manner, when a vassal, with his superior's knowledge and approbation, agreed to sell the feu, and when the superior on receiving it back by symbolical resignation, made a new grant of it in favor of the purchaser, and caused him to be openly placed in possession, the new vassal's investiture was equally a public investiture.

On the other hand, a *base* investiture was an investiture given by a vassal, without the knowledge or without the concurrence of his superior, to a third party, in whose favor he had agreed to relinquish the feu. The superior might be on a sick-bed, or far from home, or the parties might be suspicious of readily obtaining his approval. In any such case, and if the seller could in the meantime put the purchaser in possession, he gave him a charter of alienation, and when sasine followed, the investiture was termed a base investiture till confirmed.

But in every case of a pure sub-vassalage, that is, where it

is intended that the grantee and his successors shall hold permanently of and under the granter, though the holding be obviously inferior or subordinate, though the fee thereby created be essentially a base fee, yet, according to the Scottish feudal vocabulary, an original subfeu-charter and sasine are now regarded as a public investiture, just the same as any valid Crown charter and sasine, of an estate holding immediately of and under the Crown—so that a base fee and a base title are by no means synonymous.

Our ancestors, as already noticed, never made use of any such expression as public investiture or public holding, till about the middle of the sixteenth century, when an important Statute of the Scottish Parliament, to be particularly examined in a future chapter, gave rise to the use of the terms public and base, in contradistinction to each other, and also gave rise to the alternative holding *a se vel de se*, and to certain cumbrous forms of alienation, which continued in use for more than 100 years, but were afterwards superseded by the Disposition, and the improvements thereon gradually introduced by practice. If the modern practitioner knows nothing whatever about the antiquated forms alluded to, or their origin, he need never expect thoroughly to comprehend the nature of the forms now in use.

When a vested proprietor dispones with an alternative holding *a se vel de se*, or with what is commonly but erroneously termed a single holding *a se de superiore suo* (being, in fact, no holding at all till confirmed), a *de plano* sasine on his disposition is termed base so long as it remains unconfirmed. The Charter of Confirmation, though never noticed in the sasine record, and though not now followed as anciently by public reception in the superior's court, has yet the virtue, and always had, ever since these terms were invented, of converting a base into a public holding. All sasines on Crown charters, and all sasines on charters by subject-superiors, and on precepts of clare constat, are termed public sasines; not because of any greater publicity given by the sasine record to them, than to sasines on dispositions, but

because according to immemorial usage, the only mode of distinguishing between a sasine on a superior's warrant, and an unconfirmed sasine on a vassal's warrant, has been to call the one public and the other base. In the Faculty Reports, a disposition containing an obligation to infeft *a se* is sometimes termed a public right; but this is inaccurate,—a sasine on such a disposition whilst unconfirmed is not less base than a sasine on a disposition with the alternative holding. Indeed, it is more so; because, except in questions regarding terce or courtesy, or for instructing a landlord's right to pursue a removing, where any sasine may suffice, a sasine *a se* is altogether worthless till confirmed.

These unharmonizing terms, public and base, should have been long since discarded, as having no relationship to existing circumstances, or the changes which time has introduced. If it were proper to call one investiture base or low, to distinguish it from another, it would be equally proper to speak of that other as high or elevated; and if it were right to call one kind of investiture public, it would be equally so to call another kind latent or private. But the fact is, an investiture is not termed base because of its being low down in the scale, or because of any want of publicity, but because of a legal imperfection, inherent in every alienation and sasine by a vassal till confirmed. If there be any rational connexion between elevation and publicity, investitures holding immediately of the Crown or Prince, as being the most elevated, would of course be public investitures, and the only investitures to which that term could with propriety be applied. All investitures under subject-superiors, as being lower in the scale, would, whether complete or incomplete, fall under the general denomination—*base*. In the language of conveyancers, however, an investiture properly completed under its proper superior, is always termed, however low in the scale, a public investiture.

But it ought always to be kept in remembrance, that there are two kinds of base investitures, the secure and the insecure; and although this distinction is little regarded by some

practitioners, it will undoubtedly be found to exist practically. If a seller dispone a feudal property to be holden *a se vel de se*, and if the purchaser obtain sasine on his precept, the seller becomes the purchaser's temporary superior, till received by the true superior. This investiture, though base till confirmed, will effectually secure the purchaser; because the virtue of the confirmation when obtained will draw back to the date of the base sasine, and its efficacy cannot be defeated by any interim occurrence—that is, always supposing the seller's own title to be valid. But if a seller dispone to be holden *a se*, a sasine on his precept can afford no security whatever till duly confirmed, because till then it is an investiture without any superior, and if allowed to remain long in that state, mid-impediments, one or more, may intervene to render the confirmation when obtained altogether ineffectual. All this will be abundantly manifest when we arrive historically at the period already alluded to, when the terms public and base first began to be used in contrast.

It was absurd to keep up the distinctions of public and base, after the establishment of the sasine records, which give full publicity to all sasines alike, and act as a complete check against obtaining any manner of sasine clandestinely. Insertion in the proper sasine-record is publication to all intents and purposes. Why then does it not take off the stain of baseness? We are still accustomed to say, that if a sasine base when recorded be afterwards confirmed, it is no longer base but public. This cannot be proper, seeing that confirmation gives it no additional publicity, and is incapable of being communicated to the sasine record.

If it be impossible to dispense with technical terms, let us substitute for those which are plainly objectionable, others that have some intelligible reference to existing facts and circumstances. Would it not be better to substitute the epithets *perfect* and *imperfect* for those of *public* and *base*, and to say of an unconfirmed subordinate investiture, according to circumstances, *either* that it is imperfect but secure, *or* that it is both imperfect and insecure? Other improvements on

the current legal phraseology of this department might be suggested,—but indeed it would be infinitely better that the distinction of Superior and Vassal, and the whole Machinery of Resignation and Confirmation, were entirely abolished, as impolitic obstructions to the commerce of land, and altogether out of keeping with the improved manners of society at large.

Having in this and the preceding chapters given such explanations as will, I trust, facilitate the consideration of the matters now to be treated of, I propose to take these up in something like chronological order.

CHAPTER VI.

OLDEST CHARTERS EXTANT.

THE manuscript cartularies or register-books of the ancient and now long desolate monasteries of Dunfermline, Melrose, and Kelso, &c., which, thanks to the members of the Bannatyne and Maitland Clubs, may now be perused in print, contain copies of many original charters, nearly as old as the monasteries themselves; but the originals have long since perished, no care having probably been bestowed on their preservation, after being transcribed into the monkish register. The earliest in point of time consist chiefly of donations to the respective monasteries by the then reigning monarchs. Following the royal example, the grandees of those superstitious times made similar donations, the motive where one is assigned being to secure the salvation, or to purchase prayers and masses for the welfare of the donor's soul, and the souls of his departed ancestors and living relatives. Walter, the first High Steward of Scotland, who had been the Steward of King David I, afterwards of Malcolm IV, and next of William the Lion, and whose son Alan (see charter, circa 1190, quoted at p. 15), succeeded him in the stewardship, bestowed twenty acres and a toft of land on the monastery of Dunfermline, on the day of the interment there of King Malcolm, who died on 9th December 1165,—and this he did for the good of Malcolm's soul, and the souls of his ancestors, and the souls of the donor's own father, mother, and remoter ancestors, and for his own soul. The following is a copy of the grant, as appearing in the register, but without any of the contractions so embarrassing to an unpractised reader:—

Walterus filius Alani Dapifer regis Scotiæ, omnibus Sanctæ Matris ecclesiæ filiis salutem. Sciatis me dedisse et concessisse et hac mea carta confirmasse ecclesiæ sanctæ Trinitatis de Dunfermelyn, et fratribus ibidem Christo servientibus, terram meam de Dunfermelyn, scilicet viginti acras et unum toftum, pro anima Regis Malcolmi et antecessorum suorum, et pro animabus patris et matris meæ, et antecessorum meorum, atque pro mei ipsius anima, in perpetuam elemosinam, libere et quiete tenendam; et hoc sicut aliqua elemosina infra regionem Scotiæ melius sive liberius tenetur; salvo hospitagio meo mihi et hæredibus meis super eam faciendo. Testibus Ricardo episcopo Sanctæ Andreæ, &c.

[*Registrum de Dunf.*, No. 161.]

This charter was not written on the day the donation was made, but after the lapse of some time, as appears by the use of the past tense—dedisse concessisse et confirmasse, and from other circumstances. It also appears that the granter had an eye to temporal concerns as well as spiritual; for there not being then, either in town or country, any inns or lodging-houses for travellers, he stipulated that suitable lodging should always be afforded to him and his heirs when requisite. The gift was made with King William's permission, and afterwards confirmed by him, who at the same time confirmed a bequest which his deceased brother Malcolm had made to the Abbey, of an annualrent of 100 shillings out of the rent or customs payable to the Crown by the burgh of Edinburgh, and which annualrent was to continue to be so payable until an equivalent was provided elsewhere.—*Idem*, No. 52.

The above charter by Walter the Steward, is not given as the earliest document of the kind of which any evidence exists. It is certain that many charters were granted by King David I. Some by Alexander I, and, unless we are disposed to be sceptical, some even by their elder brother King Edgar. Whether any were ever granted by any prior king of Scotland, is extremely questionable. The originals of those attributed to Edgar are still extant, and one or two specimens

will be given after briefly noticing three suspicious documents of alleged greater antiquity.

The first is the pretended foundation-charter, by Malcolm II, of the episcopal see of Mortlach, copied into Ruddiman's preface from Sir James Dalrymple, and by him from the Register of the Bishopric of Aberdeen :—

[Version.]—Malcolm, King of Scots, to all his worthy men, as well clerical as laical, Greeting. Know ye that I have given, and by this my charter confirmed to God and the blessed Mary, and all the saints, and to Bishop Beyn of Mortlach, the church of Mortlach, that an episcopal see may be there established ; with my lands of Mortlach ; the church of Cloveth with its land ; the church of Dulmeth with its land ; as freely as I held them, and in pure and perpetual almsgift : Witness myself at Forfar the eighth day of October in the sixth year of my reign.

That is, in October 1009, almost fifty-seven years before the Norman Conquest.

This Malcolm is the same individual of whom it is fabled that he was a most victorious king over all the nations of England, Wales, Ireland, and Norway, and that he distributed the whole land of the kingdom of Scotland among his men, reserving nothing to himself except the royal dignity, and the Moot-hill in the town of Scone. See Acts of Parliaments of Scotland, vol. i. p. 345. Equally fabulous is it that he ever granted any such charter as the above. I wish the learned Ruddiman, who was fully aware of the objection founded on the *teste meipso*, had rejected the pretended charter more decidedly than he did. Without being at all chargeable with captiousness, one may be permitted to ask whether a clergyman can be a bishop before he has got an episcopal see to preside over, or can be *the* bishop of a particular see before such see has been founded ? But, not to dwell on that, or any of the other objections that might be mentioned, the *teste meipso*, first brought into use by the English king, Richard I, is of itself sufficient proof that the pretended charter is a palpable forgery, and that its author, by adopt-

ing that mode of making it pass for genuine, in place of the more hazardous one of appending a list of imaginary witnesses, fairly outwitted himself—not being aware that the form he adopted was unknown in Scotland till about two centuries after the year 1009.

In the preface to the last-mentioned register, it is stated (p. xi.) that the first charter in the Register (being the document in question) "was certainly meant to pass for one of "Mal-"colm Canmor"—this would bring down its date to October 1062—and we are given to understand (p. xvi.) that Fordun's account of the Episcopal See having been founded by Malcolm II, not far from the place where he obtained a victory over the Norwegians, is not to be relied upon, being "essen-"tially built upon the tradition of the Church of Aberdeen, "which, however, he has falsified or mistaken, by substituting "Malcolm II for Malcolm III, of the Episcopal Registers." The meaning of this is not very clear; but, on the whole, I apprehend we are expected to believe that the deviser of the forgery never intended it to pass as a charter of Malcolm II. If he only meant it to pass for one of Malcolm III (of which I am by no means convinced), the more absurd his conduct in relinquishing more than fifty years of antiquity, besides the interest naturally attaching to the idea of a great victory over cruel invaders,—and all for no perceptible advantage, and without being one jot the less guilty. I presume not to offer any further remark on the statement referred to, its discussion being foreign to my purpose, and not within my province. It is enough that the pretended charter is spurious, and admitted to be spurious.

Another of the suspicious writs above alluded to, forms No. I. of the Appendix to the printed Register of Dunfermline, a copy ostensibly of the foundation charter of the monastery by Malcolm III. It was not copied from the manuscript volume—its archetype is not there—but from Dugdale's Monasticon. That the Abbey was founded either by Malcolm III, or by Margaret of England, his queen, and that Malcolm bestowed various lands, which thereafter really belonged

to the Abbey for many ages, need not be doubted; but that he ever granted any such charter is another matter. It contains several internal marks of spuriousness, of which I shall only notice one. Is it credible that he who at the time of his marriage (1070) could neither read nor write, and when nobody in Scotland knew anything about donations *in elecmosyna*, would allow a charter to be written in his name, bearing that he bestowed the lands as freely as any king had ever bestowed "aliquas elimosinas," from the beginning of the world to that day? Dugdale's copy had been obtained by him from the credulous and inaccurate Sir James Balfour, the Lord Lyon or chief of the Scottish Herald Office in the time of Charles I. By Sir James it was certified that the copy agreed in all respects with the original; but, as the learned editor of the Dunfermline Register remarks (Preface, p. xxi.), "in these sceptical times this charter can scarcely "be sustained, and with it falls all proof of written title or "of writing being used in Scotland in the reign of Mal"colm III."

The third writ alluded to is the first specimen in Anderson's Diplomata, ostensibly a donation of various lands in Berwickshire, by Malcolm's natural son, sometime King Duncan II, to the monks of the monastery of Durham, which, if authentic, must have been written in 1094 or 1095; but its authenticity was called in question by Lord Hailes in 1776, and nothing worthy of notice has since appeared in its support. It seems it has a Seal appended to it, though not mentioned in the writing itself. If the monks, long after Duncan's decease, found themselves in possession of lands on the Scottish side of the Tweed, which had probably belonged to the long previously ruined nunnery of St. Ebba, what more easy in that dark and superstitious age, when detection was all but impossible, and impunity certain, than to write out a charter in Duncan's name, and append to it the impression of a seal of their own devising? Mr. Anderson saw and examined the pretended charter in September 1703 (*Historical Essay*, p. 52), long before he had any intention of publishing his *fac-similes*.

He considered it a singular document in some respects, but never doubted its authenticity. On the same occasion (to say nothing at present of a great mass of other ancient writings), he saw no fewer than five charters said to have been granted in favor of the monks of said monastery of Durham, by our King Edgar, whose reign commenced in 1098, and terminated in January 1106-7. The late Mr. William Robertson, one of the Deputy-keepers of the Public Records, who visited the monastery in 1793, and recopied Duncan's pretended charter, and three of the five attributed to Edgar (*Index*, p. 153), does not seem to have been at all aware whilst so employed that the former had been blown upon; and when afterwards made aware that such was the case, he seems to have found it nowise difficult to satisfy himself that there was no room for suspicion. Transcripts of three of Edgar's, and of one by King David I, and another by Patrick, the 4th Earl of Dunbar, may be seen in the *Registrum Magni Sigilli*, p. 202, as having been confirmed successively by King Robert the Bruce, David II, and Robert III; and *fac-similes* of two of Edgar's may be seen in Anderson's Diplomata, published in 1739. The five attributed to Edgar, are by our antiquaries now generally understood to be the oldest genuine Scottish charters extant. They all begin much alike, but vary in structure. In all, however, there is the same unity of purpose, express or implied. The lands were bestowed on the monks from motives then accounted pious, and were to belong to them as independently as the king himself had held them, without any counter-obligation, save inferentially prayers and masses. It is remarkable, however, that the charter of David I, transcribed immediately after those by Edgar, makes no mention of them, but in the form of an original grant bestows the same lands on the monks, just as if Edgar's charters had never been granted. The specialty of the date of David's charter is also remarkable:—at Peebles, in the year 1126, in the third year of his reign—to wit, about two centuries and a half before his successors began to insert in their charters the year of the Christian era. But perhaps

the confirmation by Robert I, with the subsequent confirmations, which, however, must have followed as matters of course, ought to be received by us as *probatio probata* of the genuineness of David's charter as well as of Edgar's three so confirmed; for it can serve no good purpose to conjure up doubts which, if once entertained, must for ever remain unsolved, seeing that any new light or additional information on the subject is now entirely out of the question. Besides, as appears from the Diplomata (plates viii. and x.), two of Edgar's charters were favorably noticed by his brother Alexander, after he became king, and by David when Earl of Huntingdon. The following is a version of a writ addressed by the latter to John, Bishop of Glasgow (whose diocese then comprehended some lands in Berwickshire), and to Colban and Cospatrick, probably neighbouring sheriffs:—

[*Circa* 1110.]

You yourselves know that it was adjudged before me, between the monks of St. Cuthbert and my Native Vassals (Drengos meos), concerning the land of Horverdean, to wit, that if these monks have legal witnesses, or a brief by my brother, that same land shall remain secure to them, and such is my will. Be it known to you, that I have myself seen the brief and gift of my brother King Edgar, which I have even now sent to you; and I will and grant that they shall retain freely and quietly whatever that brief testifies to them.—*Dipl. Scotiæ*, plate x.

Here David calls his brother's charter of Horverdean, a *brief*. In like manner, Alexander and he made use of the same word, *breve*, when they had occasion to notice any of Edgar's other charters; but I have never seen any other ancient document in which a charter is termed a brief; nor can I believe, indeed, I deny most emphatically, that our ancestors, before they became acquainted with the charter, ever made use of a short certificate, called a *breve testatum*. In Scottish practice, the writ called a *brief* is or was a written order, issued from the Chancery-office, in name of the reigning sovereign, usually addressed to the sheriff of the county where the party concerned resided, or where his lands lay, and directing something or other to

be done. There was the brief of Tutory—the brief of perambulation of Marches—the brief of Division—the brief of Terce—the brief of Service or Mort-ancestry, &c.

Lord Stair explains shortly the nature of the different brieves of Scottish practice, as well those that have gone into disuse, as of those still acted upon; but says not a word about the *breve testatum*. That writ may have been a common enough writ on the Continent, in the time of Charlemagne, and even in a remoter age, but I will venture to say that no form of such a writ has been or can be found in any ancient volume or record belonging to Scotland, published or unpublished. The first mention we have of it is in the Books of the Feus, *Consuetudines Feudorum*. There it is only noticed near the commencement, in the 2d, 3d, and 4th Titles, and what is said concerning it seems of little or no importance. These books, we are told, were compiled about the year 1170, and whether we may or may not adopt that averment, is to us of no consequence whatever, seeing they relate to manners and customs which prevailed in foreign countries long before the compilation was made, and may even then have begun to go into disuse. At all events, it is certain that our ancestors never adopted any of the *Consuetudines Feudorum* into their feudal system; neither could they know anything whatever about the infancy, the youth, and the manhood of Feus, or about proper and improper investitures, so copiously and so learnedly descanted upon by Sir Thomas Craig, who was better acquainted with the laws and customs of France, where he received his legal education, than with the ancient history of Scotland. Our feudal system from a small beginning rose gradually and imperceptibly into formidable dimensions—like a small shoot from a mature exotic, accidentally imported and planted in this part of the world, it attracted at first little notice, but becoming inured to the soil and climate, it not only increased but underwent a radical change. Our ancient feudal system was a feudal system *sui generis*. It is very easy for those who are credulous respecting antiquities, to say with one law-writer that the *breve testatum* was a

written declaration by a superior, that he had given possession; and with another that both he and the *Pares curiæ* appended their seals to it—when in Scotland the *Pares curiæ*, at least, had no seals to append; and, with a third, that it was the foundation of the charter, and equivalent in its effect to charter and sasine combined,—all possibly quite correct, if only meant to apply to ancient continental customs that have long since gone into oblivion. In relation to the present subject, I beg leave to direct the reader's attention to the following salutary caution:—"The system received in "Scotland differs so widely from the *consuetudines feudorum* "in the most important articles, that whoever studies them "as common feudal rules, without duly attending to the "special usages of our own country, will wish to unlearn them "when he comes to practise in our courts."—*Erskine*, II. iii. 6.

But to return to Edgar's charters, and assuming that the whole five are genuine, I shall here transcribe one as a specimen. The reader may see its *fac-simile* in Anderson's Diplomata, plate VI.

[*Circa* 1105.]

Edgarus Rex Scottorum, omnibus suis hominibus Scottis et Anglis, Salutem. Sciatis quod ego do in elemosinam, Deo Omnipotenti, et sancto Cuthberto domino meo, et ecclesiæ Dunelmensi, et monachis in eadem ecclesia Deo servientibus et in perpetuum servituris, pro animabus patris mei et matris meæ, et pro salute corporis mei, et animæ meæ, et fratrum meorum et sororum mearum, et pro omnibus antecessoribus et successoribus meis, Mansionem de Coldynghame, et cum ista mansione has subscriptas mansiones, scilicet Aldecambus, Lummysden, Rayntoun, Restoun, Swynwodde, Farnedoun, Eytoun, aliam Eytoun, Prendregest, Cramsmuth; has superscriptas mansiones concedo Deo et Sancto prædicto et monachis ejus, cum omnibus terris silvis et aquis, et tolneis, et fracturis navium, et omnibus consuetudinibus quæ pertinent ad prædictas mansiones, et quas pater meus in eis habuit, quietas et solidas, secundum voluntatem illorum imperpetuum libere disponendas.

Some of these lands, now of great value, still preserve the

names they were known by in Edgar's time: Lumsden, Renton, Reston, Swinewood, Ayton, and Prenderguest. These lie at no great distance from the then site of the church of Coldingham, and possibly may have belonged to the nunnery of St. Ebba, before it was destroyed by the Danish incursion. If so, Edgar's act should rather be regarded as a restoration of the lands to sacred uses than an original gift. This conjecture is in some measure supported by the fact that Edgar's other donations, Swinton, Paxton, and Fishwick, bestowed singly by separate charters, lie at a greater distance from Coldingham, and probably never belonged to the nunnery. The terms of the charter of Swinton, of which a *fac-simile* may likewise be seen in the Diplomata, are particularly worthy of notice. It bears that Edgar had been present at the dedication of the church of St. Mary at Coldingham, and that he had (symbolically of course) offered the town of Swinton upon the altar, as an endowment to the said church. Swinton therefore was a *bona fide* original gift, that is, if the charter be genuine, which it certainly seems to be. The reader, however, may chose to judge for himself—therefore, and as it is a curious specimen of ancient practice, I trust he will not be displeased to see how it looks in a plain version :—

[*Circa* 1105.]

Edgar, King of Scots, to all Scotsmen and Englishmen throughout his kingdom, Greeting. Know ye that I came to the dedication of the church of the blessed Mary at Coldingham, which dedication gratifying and acceptable to all, has been honorably conducted to the praise of God, and agreeably to my decree: And for the souls of my father and mother, and for the welfare of my own soul and those of my brothers and sisters, I offered upon the altar and gave in endowment to the said church, the whole town of Swinton by its marches, to be held as Lyolf held it, free and for ever privileged from all challenge, and to be disposed of according to the will of the monks of St. Cuthbert: I have also given to the foresaid monks twenty-four animals for improving that same land, and have established the same peace in Coldingham, in outgoing and incoming, and therein abiding, as is observed in the Eland (that is, in Holy

Island), and in Norham. Furthermore, I have settled with the men within the territory of Coldingham (as they have of their own accord resolved to do and in my hand confirmed), that they shall pay to the monks yearly for each plough half a merk of silver. Witnesses, Alfwin and Thor-longus, and Alfric the cupbearer, and Algarus, a presbyter, and Osbern, a presbyter, &c.

In the same Repository (Treasury of Durham Cathedral), from which Mr. Anderson obtained some of his oldest specimens, there are a vast number of charters and precepts by Scottish kings and nobles in favor of the monks of Durham, extending over a period of about three centuries and a half, all of which may now be seen in print in Raine's North Durham. Next after Edgar's two charters above noticed, Mr. Anderson's costly publication contains *fac-similes* of three writs by his immediate younger brother and successor, Alexander I. There is little illustrative about them, but as they are next in antiquity to Edgar's charters, I shall give the import of one of them as a specimen.

[*Circa* 1108.]

Alexander, by the grace of God, King of Scots, To Algar the Prior, and all the congregation of St. Cuthbert, Greeting. Know ye that I as my own act give and grant to God and St. Cuthbert, and to you his monks, all Swinton free and secure; to be holden and entirely to hold as the brief of my brother King Edgar testifies to you. Moreover, I command and insist that none of you shall in any manner plead or answer to any man concerning that same Swinton, unless I myself shall so direct, by word of mouth or by my letters, because I and my brother David will resign to the foresaid Saint, and to you the monks, the almsgift of our brother Edgar and our own likewise.

The next deed to be noticed is a charter to the same monks by Thor-Longus, one of the witnesses to King Edgar's Dedication-charter. Concerning this unique production, George Chalmers says [I. 738.] that it is the oldest charter of alienation which has hitherto been produced, or perhaps will ever be found.

[*Circa* 1110.]

[Version.]—To all sons of Holy Mother Church, Thor-Longus, Greeting in the Lord. Know ye that my Lord Edgar, King of Scots, gave to me Ednam when a desert, which with his aid and my own money I have colonized, and there built a church in honour of St. Cuthbert; which church, together with a carrucate of land, I have given to God and St. Cuthbert, and to be possessed by his monks for ever. This donation I have made for the soul of my Lord King Edgar, and for the souls of his father and mother, and for the salvation of his brothers and sisters, and for the redemption of my dearly beloved brother Lefwin, and for the salvation of my own self, as well body as soul. And if any one shall devise how by any violence or craft this my donation to the foresaid Saint, or the monks serving him, may be taken away, may God omnipotent take away from him the life of the heavenly kingdom, and may he undergo eternal pains with the devil and his angels. Amen.—*Dipl.*, plate lxix.

As yet our ancestors knew nothing of the Feu-charter—for no other kind of written transference had yet been seen but donations to monastic establishments; and until David I gave peculiar demonstration of the fervour of his piety, the number even of these must have been very inconsiderable. Before the end of his reign, however, they had multiplied abundantly, and as they were bestowed absolutely, without any condition or counter-obligation, being by the very act emancipated from secular jurisdiction and responsibility, they required no great expenditure of words or formality of diction. Accordingly, David's grants were often expressed very laconically. For example, in or prior to 1130, he thus bestowed on the monastery of Dunfermline, the estate of Carberry, in the parish of Inveresk:—

David Rex Scottorum omnibus hominibus suis salutem. Sciatis me dedisse et concessisse Ecclesiæ Sanctæ Trinitatis de Dunf: in Elemosina, Crefbarrin. Testibus Joanne episcopo, E. cancellario et Hugone de Morevill. Apud Elbotle.—*Reg. de Dunf.* No. 5.

That is—David, King of Scots, to all his men, Greeting. Know ye that I have given and granted to the Church of the Holy Trinity

at Dunfermline, the land of Carberry in almsgift. Witnesses, John the bishop, Edward, my chancellor, and Hugh Morville. At Elbottle.

With equal brevity he bestowed the patronage and revenue of the church of Inveresk :—

[*Circa* 1135.]

David, by the grace of God, King of Scots, to all his faithful men, Greeting. Know ye that I have given in almsgift to the Church of the Holy Trinity at Dunfermline, the Church of Inveresk, after the death of Nicholas the priest. Witness, John the bishop. At Dunfermline.—*Idem*, No. 30.

In proof of the antiquity of this last charter, it may be mentioned that Nicholas, the life-incumbent by reservation, died in 1140. He was a Culdee priest.

The above donations contained neither tenendas nor reddendo. In that age, whatever was bestowed on the Church was parted with for ever, and was held by the Church in full dominion. The only supremacy it acknowledged was the spiritual jurisdiction of the Pope; and although the Church was understood to make provision for the poor, and for the performance of divine service, it did so not as natural obligations, but as religious duties; but when the Crown made a grant to one of the laity, the supremacy was virtually reserved by the tenendas and reddendo.

The following version of another charter by David I, somewhat fuller, may perhaps by some readers, to whom the fact thereby recorded may be new, be considered somewhat interesting :—

[*Circa* 1138.]

David, King of Scots, to the Bishops, Abbots, Earls, Sheriffs, and all the worthy men of his whole realm, Greeting. Know ye that I have granted and given to the canons of St. Andrews, the island of Lochleven, that they may there institute a canonical order: And if the Culdees who shall be found there be willing to live regularly, they may remain with them and under them in peace: but if any one of them shall be inclined to offer resistance,

I will and command that he be expelled from the island. Witnesses, Robert, Bishop of St. Andrews, Andrew, Bishop of Caithness, &c. At Berwick.—*Dipl. Scotiæ*, plate xii. *From the archives of the University of St. Andrews.*

The formidable instruments in the Registers of Dunfermline, Holyrood, Cambuskenneth, &c., transcribed into vol. i. of the Scottish Acts of Parliament, containing general confirmations of all the lands and privileges then belonging to the respective monasteries, are not charters, but rather minutes of Parliamentary Sederunts, probably written out weeks or months before the conventions at which they were authenticated and adopted.

I have nowhere seen a single instance of a proper Feu-charter by King David I. The first of the specimens of ancient Feu-rights contained in the last-mentioned volume (p. 82), appears to be a copy of a grant by him of the land of Annandale to an ancestor of Robert I, and whereof the original, as we are given to understand, is in the British Museum ; but it contains nothing of the nature of a Tenendas or Reddendo. From the witnesses I should imagine that if genuine it was granted about the year 1140. It will not admit of a fluent translation throughout.

David, by the grace of God, King of Scotland, to all his barons and men, and French and English friends, Greeting. Know ye that I have given and granted to Robert of Brus, Strathannan, and all the land from the march with Dunegal of Stranit, as far as the march with Randulph of Meschin. And I will and grant that he shall have and hold that land and its castle, well and honorably, with all its customs, especially with all those customs which Randulph of Meschin ever had in Carlisle, and in his own land of Cumberland, on what day soever he possessed the best and the free-est. Witnesses, Eustace, the son of John, and Hugh Morville, and Allan of Percey, and William of Sumervill, &c. At Scone.

The second specimen in said volume is copied from the Diplomata, being an original Feu-charter by a subject-superior, Waldev, Earl of Dunbar, who died in 1180.

[*Circa* 1175.]

Waldev, son of Cospatrick, To all his worthy men and all friends, as well future as present, Greeting. Know ye that I have given and granted and by this my charter confirmed to Elias, the son of Uchtred, [the land of] Dundas, for the service of half a knight; he and his heirs to hold of me and my heirs in feu and heritage; in moors, in waters, in pools, in mills, in meadows, in pastures, with all rightful marches and pertinents: I grant therefore, and will and command that he the foresaid Elias shall have and hold that land as quietly and freely and as honorably as no knight holds of a baron more freely, quietly, and honorably, within the whole realm of the King of Scotland. Witnesses, John, the son of Orm, &c.—*Dipl. Scotiæ*, plate lxxiii.

I pass over the next examples in said volume of the Parliamentary acts, as being rather lengthy. But as I should like to present one proper specimen of the ancient Regal infeudation-charter, I select the following by William the Lion, than which I have not observed an earlier instance more concise and perfect. The reader will perceive that the holding was of the kind afterwards termed in Scotland ward-holding.

[*Circa* 1175.]

William, by the grace of God, King of Scots, To the Bishops, Abbots, Earls, Barons, Justices, Sheriffs, Provosts, Officers, and all worthy men of his whole realm, clerical and laical, Greeting. Be it known to all present and to come, that I have given and granted, and by this my charter confirmed to Henry Rule, the land of Cultrach by its right marches: To be holden to him and his heirs of me and my heirs, in feu and heritage,—in wood and plain, in lands and waters, in meadows and pastures, in mills and ponds, and all its just pertinents; with sac and soc, with toll and tehm, and infangenthief, freely and quietly, fully and honorably, by the service of half a knight. Witnesses, Walter of Bidun, Chancellor; Earl Duncan, &c., at Cluny.—*Liber de Balmorinach*, No. 2.

Some patriotic Scotsmen may perhaps not care to be informed that the charter, though it has for many ages disappeared from English practice, was known in England sooner than in Scotland—that our ancestors only imitated or adopted

—and that the old words, sac, soc, infangthief, hamesucken, &c., which many believe to be pure old Scotch, had their origin in Anglo-Saxon usages, known in England before the time of William the Conqueror.

Charter by King Henry I, regranting to the Abbey of Westminster certain lands in London, which had long previously been bestowed by Edward the Confessor.

[*Circa* 1120.]

Henry, King of the English, to his Bishops, Barons, Sheriffs, and all his faithful men and servants, and to the burgesses of London, Greeting. Know ye that I have granted to God and St. Peter, and to Herbert the Abbot of Westminster, for the welfare of my soul, and the soul of King Edward my kinsman, and the souls of my ancestors and successors, those lands in London which the foresaid King Edward gave to that Church, and those which St. Peter previously held therein, by whomsoever given: And I will and grant that they shall possess all the laws and customs which the foresaid King Edward granted, and by the privilege of his charter confirmed; towit, sac and soc, and toll and team, and infangenthief, and Flemingfirmth, Miskenning, and Skewage, and peace-breaking, and home-invasion, and all assaults in the law, on the road and off the road, at feast and fray, on water and on land, fully and freely, and quietly and calmly: And if any one in the same burgh shall hereafter bestow land, or church, or house, I command and firmly charge that the church shall have them as fully exempt from all trouble of every kind of exaction, as those which they best possessed in the time of the foresaid King Edward. Witnesses—Ralph, Archbishop of Canterbury, &c.—*Form. Angl.* No. 65.

In the large French work on Diplomatics (*Nouveau Traité de Diplomatique*, Paris 1762), it is observed, vol. v. p. 815, that anciently the kings of England commenced their charters with an invocation: "In nomine sanctæ," &c., but that all the original charters of the kings of Scotland, in Anderson's Diplomata, are without invocations—that Edgar and Alexander I commenced theirs with a very short initial address, such as "Omnibus suis hominibus Scottis et Anglis Salutem"—and

that David I imitated the more copious style of the kings of England: "David Rex Scottorum, (or David Dei gratia Rex "Scottorum) Episcopis, Abbatibus, Comitibus, Vice-comiti-"bus, et omnibus probis hominibus totius terræ suæ Salutem."

But, in point of fact, David's charters and those of his grandsons, Malcolm and William, were usually copious or concise, just as suited the particular occasion. We have already seen how laconically in exordium and otherwise he bestowed the estate of Carberry and the church of Inveresk. But upon great occasions, such as Foundation-charters and General Confirmations (if these last when done in Parliament can be called charters), not only David and his grandsons, but even Alexander II and Alexander III commenced such writings with a solemn invocation:—"In nomine Sanctæ "Trinitatis," or, "In nomine Sanctæ et Individuæ Tri-"nitatis."

All ancient charters abound with contractions, which are very embarrassing to the unpractised reader. Another inconvenience is the want of the diphthong *æ*, and the constant use of the single *e* in its stead. Frequently, too, the letter *c* is substituted for the letter *t*—indeed, almost always so, where *t* in the proper spelling would, if followed by *i*, have the soft sound of *c*. This mode of spelling, suggestive of the right pronunciation, must have been invented by the monks, for the guidance of young and uneducated readers, when assisting in the services of the Church. But unless where *fac-similes* are wanted, it is enough that transcripts of ancient writings will be read with more facility and satisfaction, if given free of contractions and in the proper spelling.

Anciently, all charters and precepts were written on one side only of the parchment, or other material employed, because the impression of the seal, or the more ancient usage, the adhibition of the sign of the cross, behoved to be on the same side as the writing. An old manuscript, therefore, cannot be an original deed or instrument, if found to be written on both sides, but must be a copy only or a leaf from a register. Many of our *oldest* writings may be easily read—much

more easily after a little practice than those who have never tried to do so may imagine. The manuscripts of any given period have almost always a remarkable sameness of character, as if the few who could then write had been taught at the same seminary. Their number could not have been great, when the chaplains of kings and noblemen were their official secretaries, and when the kings and noblemen themselves devolved on them every epistolary operation. In very ancient times it was not every churchman, nor even every prelate, who could use the pen, for many high in office could scarcely write their own names. At the same time, when some few here and there of those who had been educated for the church, were the only penmen in Christendom, task-writing must have been deemed a religious exercise.

From its first introduction, the charter has always been in an epistolary form, and almost always in Latin, that is, monkish Latin—in Scotland invariably so, with Crown charters at least, till the time of Oliver Cromwell, and though after the Restoration the Chancery of Scotland, at the command of the Court of Session, returned to the ancient custom, Subject-superiors for the most part adhered thereafter to the better practice which he had introduced. Happily at last, in our own times, by a statute passed in June 1847, it was enacted, that from and after the first day of October of that year, "all "charters granted by Her Majesty or the Prince and Steward "of Scotland, and the Instruments of Sasine following thereon, "and all precepts from Chancery for infefting heirs, and In-"struments of Sasine thereon, shall be expressed in the Eng-"lish language."

It might be reckoned unpardonable to close this chapter, on the most ancient writings of Scotland, without taking notice of the Book of Ancient Forms, so largely commented upon by Mr. Walter Ross, said to have been partly composed or compiled by a French monk, of the name of Marculfus, about the year 660, at the command or request of Landericus, then Bishop of Paris. It was published in Paris in 1613, by

Jerome Bignon, then in his twenty-third year, afterwards principal keeper of the Royal Library, and republished in 1665, nine years after his death. It was also published in 1613 by Lindenbrogius, in a collection of ancient authors on the laws and usages of France; but in his edition the forms of Marculfus are arranged in quite a different order from that adopted by Bignon. The edition of 1665 contains a prefatory address to the reader, by the printers or publishers, by which we are told, among other things, that the most illustrious Bignon was the first who brought to light this most noble work, long hidden in the dust of the Royal Library. Bignon himself says nothing about the wonderful discovery; yet he thinks it right to explain that he never experienced any difficulty respecting the authorship of the rarest portion of the work, or when or wherefore it was composed; because, fortunately, there was prefixed to it an epistle dedicatory, by the author himself to his patron the bishop, containing materials for answering all proper inquiries:—*Name?* Marculfus —*Profession?* a monk—*Age?* seventy—*Inducement?* the command of said patron Landericus, who, according to Bignon, could have been no other than the famous Bishop of Paris of that name, who lived in the time of King Clovis, son of Dagobert, about the year of the Christian era 660. In the preface to the edition of Lindenbrogius, there is a passage which seems at variance with the above, though quoted among the testimonials to the edition of 1665. It is to this effect:—"Concerning the monk Marculfus, who composed a "Book of Forms, I cannot well say who he was. I know that "in old libraries there is extant a life of a certain Abbot "Marculfus; but the question is not of sufficient importance "to be dwelt upon here at greater length. It suffices that he "left us this book, which indeed the chiefest jurisconsults of "our age, Cujacius, Brissonius, Pithæus, &c., made so much "of, that they did not disdain to insert from it some forms "in their very learned writings." So that the manuscript of Marculfus must have been well known before it was published by M. Bignon, and the story of its amazing antiquity

and its fortunate discovery after reposing 953 years in an obscure corner of the Royal Library, must be a fable.

I would willingly, if not to be thought tedious, examine some of the specimens in the work of Marculfus, with a view to ascertain their intrinsic value. The following is a free version of No. 20 of his second book, page 84, and whereof the original is transcribed verbatim by Mr. Ross, at page 83 of his second volume :—

Sale of an area within a city.

To the holy and apostolic Lord, the Lord and Father A, Bishop of B (the purchaser), such a one (the seller). I hold it settled, that I, constrained by no authority, or pretended right, but with proper determination of will, have sold to you, and verily I have sold, the area belonging to me, within the walls of the city of E, having in length so many feet, and in breadth so many feet, which adjoins at the one side such a land, at the other side such a land, on the one front such a land, and on the other front such a land: and I have received from you in price, just what hath satisfied me, of gold so many coins, and I have now delivered to you the foresaid area to be possessed, and you can enjoy it with the free power of having holding or making of it whatever you shall choose. And if any one, which I trust will not be, if I myself or any of my heirs, or any person whatever shall attempt to impugn this sale, or endeavour to break it, it shall infer to you or your heirs the double of the money, or as much as the area itself then improved shall be worth; and what the challenger seeks to vindicate shall not avail, but the present sale shall in all time remain firm. Done at ——, on such a day, in such a year.—*For manner of dating, see No.* 22.

The following two examples are taken from that division of the work titled, *Formulæ Veteres secundum Legem Romanam*, the one relating to the sale of a field or vineyard, and the other to the sale of a slave :—

No. 8, *of page* 179.

To Squire such a one (the purchaser) I, such a one (the seller). I hold it settled that I have sold to thee, and verily I have sold, a field or vineyard belonging to me within the district of St. Martin in the

place called ——, having arpents or half-acres so many: there is on the one side or front the land of such a person, and on the other side or front the land of such another person. And I have received from thee the price thereof, with which I am well content, to the worth of so many coins; so that from this day forth thou shalt have free power to do whatever thou shalt have a mind with the foresaid field or vineyard, saving the right of the said saint. And if it shall be that either I myself, or any one of my heirs, or any person whatever, shall presume to devise any challenge against this sale, or (seek) repetition, to the party against whom he shall bring the suit, he shall compound with fifteen shillings, and this sale shall remain firm.

No. 9 *of same page.*

To (&c. as above). I hold it settled that I have sold to thee, and verily I have sold, the slave belonging to me, by name (so) not a thief, nor a fugitive, but possessed of a sound constitution and well-behaved; for whom I have received from thee the price wherewith I am well content, value coins so many. So that from this day forth thou shalt have free power to do whatever thou wilt with the foresaid slave. And if it shall be—(Verbatim as above—with this difference, that the challenger shall compound with sixty shillings).

From the above, and from other sales scattered up and down in the book, it appears that (when and where used) there was no difference in point of form between a writing regarding the sale of a house or a piece of land, and a writing regarding the sale of a bond-slave. Each contained a sort of warrandice clause, in the shape of a declaration, that any future challenger should have to pay a penalty, and yet that the sale should remain as firm as if no challenge had been made—and houses and lands were transferred without any tenendas or reddendo, or any implied subjection to any superior. But, after a most careful investigation, I have been able to discover nothing else, anywise interesting to the Scottish Antiquary, or of the least utility to the Scottish Conveyancer. Moreover, there is not a single word, in any one of the *formulæ* of which the volume consists, containing any allusion to the feudal system, as being then in observance within the district of Paris, or elsewhere in France.

CHAPTER VII.

OTHER ILLUSTRATIONS OF ANCIENT SCOTTISH PRACTICE PRIOR TO THE ACCESSION OF KING ROBERT THE BRUCE.

In the following versions, as in those previously given, less regard has been paid to neatness and fluency than to their being literally true to the originals.

(1.) Charter of Foundation of the Burgh of St. Andrews, by Bishop Robert, about the year 1140.

Robert, by the grace of God, the humble minister of St. Andrews, to all the faithful as well future as present, Greeting. Be it known to your benevolence that by the help of God, and with the leave of David our King, We have founded a burgh at St. Andrews in Scotland, and with the King's consent and his firm peace have constituted Mainard, a Fleming, provost in that same burgh: And we grant to said Provost Mainard and his heirs for his service, faithfully evinced to us and ours, three tofts in that burgh, namely, from the street of the burgh all the way to the Prior's Burn, free and exempt from all custom,—for sixteen nummi, being four pennies to each virgate of land,* (and) because he is one of the first who began to project and build the foresaid burgh, therefore we humbly beseech our successors, for the love of God, of St. Andrew, and of us, to favor and countenance him and his heirs: And let no one do him or his any injury, on pain of the excommunication of God, of St. Andrew, and of us: And if any one for whatever cause shall do him an injury, the king of the country shall not defer to

* I confess, with regret, though perhaps it is of little or no importance, that I have been unable to discover the value of the coin here called a Nummus, or the quantity of ground included in the measure here termed a Virgate.

do him right for God's sake; which, if he shall not do, the King of kings, the just and impartial Judge, shall do him right in the day of His great avenging. Verily, the foresaid town is the almsgift of that blessed king, and he the foresaid Mainard was his proper burgess in Berwick, whom he with the foresaid almsgift also bestowed in almsgift on St. Andrew and on us—witnesses hereto William, the prior of that town, (and) Torreld.—*Scots Acts* (*App. to Preface*), I. 75, *copied from the Black Book of St. Andrews in the City Archives.*

The office of Provost was, we are told, conferred on Mainard, the Flemish merchant, because from his having been for some time a residenter in the trading town of Berwick, he was well acquainted with burgh usages.

It will be seen that the Bishop who styles himself the humble minister of St. Andrews, speaks in the above charter in the first person plural. All bishops, from a very remote period, were accustomed to do so, after the example doubtless of the pretended successors of St. Peter. As yet, and till long afterwards, the kings of England and Scotland were accustomed to speak in the first person singular. Richard Cœur de Lion was the first English king, and some years after him Alexander II was the first Scottish king, who made use of the plural number in their charters. The long Deed by Malcolm IV, confirmatory of the rights of the monastery of Scone (Liber Ecclesiæ de Scon, No. 5), and wherein he plentifully makes use of the plural number, cannot be reckoned contradictory of this remark. For, except that it does not conclude with a fulmination, it is entirely in the style of a Pope's Bull. The first draft may have been literally so, and may have been afterwards (there being then a schism among the cardinals), turned into a Deed by the king himself.

(2.) Charter on the sale of an annualrent to the Abbot and Convent of Kelso, in 1147.

To all the faithful in Christ to see or hear the present writing, Walter of Forgrund, burgess of Berwick, and Marjory his spouse,

daughter and heiress of the late John Hanyn, burgess of Berwick, Greeting in the Lord everlasting. Know ye that We, with one consent and assent, for a certain sum of money to us by hand paid, in our great necessity and manifest poverty, for our and our children's support, and for rebuilding certain lands of ours, plundered and laid in ruins, as also for redeeming certain other lands of ours, taken out of our management and long occupied and detained by other persons for arrears of duties, have sold, granted, and by this our present writing confirmed to the abbot and convent of Kelso, and have wholly quit-claimed, and by staff and baton, as well in the court of the Lord the King at Berwick, as in the court of the said Lord the Abbot, as superior of that fee, have surrendered that annualrent of two merks which we have been in use to receive from that land which John of Norway lately held in the town of Berwick : which land lies between, &c. To be holden, &c. Rendering therefrom yearly to us and our heirs one pound of cumin or two pennies at the feast of St. James, during the fairs of Roxburgh, for all that can be exacted, &c. And we the foresaid Walter and Marjory and our heirs shall warrant, acquit, and for ever defend the foresaid annualrent of two merks to the foresaid abbot and convent against all mankind : And if it shall happen that we or our heirs, &c., anywise come against the premises, or any part thereof, we grant us, &c., to be bound in £40 sterling towards repairing or improving the fabric of the church of the blessed Mary of Kelso ; subjecting us and our heirs to the jurisdiction and coercion of any ecclesiastical judge whom the said abbot and convent shall be pleased to choose, &c. And for greater security in the premises, we have bound, and by the tenor of the present writing, bind in pledge to the said abbot and convent our lands or tenements lying upon the Ness, between the land, &c., so that the said abbot, or his bailie for the time being, may freely enter the said lands and tenements, and take full sasine thereof, and have and hold the same without leave asked, &c., until they shall fully uplift or receive therefrom the foresaid £10 and damages, interest and expenses, if we or our heirs shall come against the premises or any part thereof, as said is : Renouncing in that case for us and our heirs all action, exception, &c., and all remedy of canon law or civil law, which can be proponed against the present writing.—*Register of Kelso*, No. 34.

Considering the great antiquity of this charter, it is interesting to find that it contains so many particulars worthy of notice. 1st, Its consistency with the old law, that heritage could not be sold, unless the owner was in absolutely necessitous circumstances. This, at least, was Burgh-law (Leg: Burg: No. 42), and the annualrent here sold was payable from a property within the town of Berwick. 2d, The then precarious value of property in general—liable to sudden destruction by hostile invaders, or to be seized for superiors' claims. 3d, The public surrender here made by staff and baton in two different places. 4th, The clause of warrandice under the penalty of £40, to the fabric of the Abbey church. 5th, The conveyance of other property in real warrandice, with power to enter into possession *de plano*, should the sellers or their heirs attempt to invalidate the transaction; and, 6th, Renunciation of every legal plea which might be urged against its validity in either a civil or an ecclesiastical court. The reader who knows that two merks Scots are now only equivalent to $2/2\frac{5}{9}$ sterling, will perhaps cease to be surprised at the great length of this charter (which I have considerably abridged), when informed that when it was written two merks contained sixteen ounces of silver coin, troy weight, of more marketable avail *then* than £30 sterling *now*. Frequent allusion will be found in deeds of alienation to the above mentioned old law, long after it practically became obsolete.

Connected with the above is the writ No. 31 of same Register. It is also very lengthy, and has all the formality of a charter, but is just tantamount to a judicial ratification by the above Walter's said spouse Marjory. It sets forth, that not compelled by force or fear, but of her own accord, she had consented to the sale, and had taken her *bodily* oath, the holy evangelists touched (that is, with her hand upon an open manuscript volume containing the gospels), that she should never challenge the bargain of sale—and she (a married woman, without concurrence of her husband), became bound to the Abbot in £40 sterling, towards the renovation

or reparation of the church of Kelso, within one month from the day that she or her heirs should happen to do so.

(3.) Charter of Donation by Henry, Earl of Huntingdon and Northumberland, only son of King David I, to Arnold, Abbot of Kelso, of a toft in Berwick, to be held *de se* in feu, but without being subject to any reddendo.

[*Circa* 1150.]

Earl Henry, son of the King of Scotland, to the Bishops, Abbots, Justices, Barons, Sheriffs, Auxiliars, and all his men, French and English, clerical and laical, of his whole land, Greeting. Know ye that I have given and confirmed to Arnold, the Abbot of Kelso, that toft (Dodyn's) in Berwick-upon-Tweed: To be holden of me in feu: I will therefore, and firmly charge, that he shall have and hold the forenamed toft as fully as the foresaid Dodyn ever most fully had and held it: And he shall even hold that toft of me in feu, as freely and quietly as he holds the possessions of his church most freely and quietly, in almsgift. Witnesses (not named.)—*Register of Kelso*, No. 29.

No. 40 is just a verbatim repetition of the above, with this only difference, "dedisse et concessisse," in place of "dedisse et confirmasse."

When the Earl's second son William became king, he, per No. 32, regranted the same toft to Abbot John, in the self-same manner: "To be holden of me in feu; which toft "Earl Henry, my father, gave to Abbot Arnold: I will there-"fore," &c. the rest almost verbatim with the above—"as the "charter of Earl Henry, my father, testifies and confirms."

(4.) In contrast to the above, there may be seen in the same register, a grant by said Abbot John and his convent, to a man and his heirs, without a tenendas, yet subject to a reddendo by no means elusory, seeing that with a nominal sum of eight shillings, towit ninety-six silver pennies,* more of the necessaries of

* See Note A at the end of the volume—*the ancient silver penny.*

life could then have been purchased, than can be now had for £10 of our money.

[*Between* 1160 *and* 1180.]

To all sons of holy mother church, John Abbot of the church of St. Mary of Kelso, and the whole convent of the same church, Greeting. Be it known to all, present and future, that with common consent of our chapter, we have given to our man Osbern, and his heirs, a half carrucate of land within the territory of Middleham: But he has become our liege-man, and for that land shall render to us year by year eight shillings, half at Whitsunday, and half at Martinmas; and he shall perform his peat-service three days in autumn, with two men each day, and he shall get his plough to plough to us thrice in the year. Witness our chapter.—*Kelso, Nos.* 117 *and* 470.

(5.) An original sub-infeudation by a subject-superior, for the grantee's military service,—one of the oldest of the kind extant.

[*Circa* 1175.]

Walter of Berkley, chamberlain of the King of Scots, to all his friends and men, both present and future, Greeting. Know ye that I have given and granted, and by this my charter confirmed, to William, the son of Richard, for his service, (the land of) Croswaldef by its right marches, in wood and plain, in meadows and pastures, in pools and mills, in moors and marshes, and in all other pertinents: To be holden to him and his heirs, of me and my heirs, freely and quietly, fully and honorably; performing the service of half a knight. [N.B.—One of the witnesses, the last named, is Robert, a clerical person, *who wrote this charter*—Roberto clerico, *qui hanc cartam fecit.*]—*Dipl. Scotiæ*, plate lxxvii.

(6.) In the time of William the Lion, one landed proprietor could by charter sell and transfer to another, the person of a peasant born within his territory, with all his progeny, born and to be born.

[*Circa* 1178.]

Richard of Morville, constable of the King of Scots, to all his worthy men and friends present and to come, Greeting. Know

ye that I have given and quit-claimed (that is, released from their bondage to me), and by this charter confirmed, to Henry of St. Clair, for three merks which he gave me; Edmund the son of Bonda, and Gillimichael his brother, and their sons and daughters, and whole progeny descending from them, loosened and freed from me and my heirs, to him and his heirs; on this condition, that if it shall happen that they in any event go away from the foresaid Henry, that is with his permission and good will, it shall not be lawful to them to pass over into the dominion of another master, or to any other than myself and to my land.—Witnesses, Alan the son of Elrick, &c.—*Dipl.* plate lxxv., *and Scots Acts*, I. page 84.

Bondsmen in that age seem to have been the slaves of the land on which they were born, rather than of its proprietor, and when the land was transferred, they were tacitly understood to be transferred with it, as a matter of course—and yet we see here that they could be removed from their native soil, and transferred by themselves. It seems to have been not unusual in those days to make donations of them to monkish establishments, doubtless to be cultivators of their lands—[*Register of Dunf.*, Nos. 19 and 64, and *Kelso*, No. 128] and there can be little doubt that such establishments, before they degenerated into nurseries of idleness and licentiousness, tended to soften the rude and lawless manners of the age, and that the poor serfs would soon find their condition much improved, when they or the lands to which they belonged were so bestowed. From the Register of Dunfermline [No. 302], we find that Abbot Archibald and his convent [*Circa* 1190] gave their freedom to a number of gyllies, whose progenitors King David had bestowed on the Abbey, along with the lands of Carberry; but they were to give a two-year-old ox, or four shillings yearly to their benefactors.

(7.) Charter of Confirmation by said King William, of a sale made by one of his vassals, in the form of a sub-infeudation.

[*Circa* 1180.]

William, by the grace of God, King of Scots, to all worthy men

of his whole realm, clergy and laity, greeting. Be it known to present and future, that I have granted, and by this my charter confirmed, to Richard, the nephew of Simon, late prior of Coldingham, the sale which Ralph, the son of Elwald, made to him, of one toft in Coldingham, and twenty acres of land; to be holden to him and his heirs of the foresaid Ralph and his heirs, as freely and quietly as the charter of the same Ralph justly testifies; saving my service. Witnesses, Walter and William, my chaplains, &c. at Jedburgh, the 2d day of August.—Raine's *North Durham*, *No.* 57.

(8.) Charter by the same king, re-granting to William de Valoniis the lands of Benvie and Panmure, which he had originally feued to his father.

[*Circa* 1190.]

William, by the Grace of God, King of Scots, to the bishops, abbots, earls, barons, justiciaries, sheriffs, provosts, assistants, and all worthy men of his whole realm, clerical and laical, Greeting. Be it known to present and future, that I have re-bestowed and granted, and by this my charter confirmed to William Valence, son of Philip Valence, those lands in Scotland which I gave to the same Philip his father; towit Benvy by its right marches, and with all its just pertinents, and Panmure by its right marches, and with all its just pertinents: To be holden to him and his heirs of me and my heirs, in feu and heritage, in wood and plain, in lands and waters, in meadows and pastures, moors, mosses, and marshes, pools and mills, parks and fishings, roads and by-paths, sands and salt-pans, harbours, with all other pertinents justly belonging to the foresaid lands; with soc and sac, with pit and gallows, with thol and theam and infangenthief, freely and quietly, fully and honourably, for half a knight's-service; as the charter to the foresaid Philip Valence, his father, testifies. Witnesses, R. Bishop of St. Andrews, &c. at Stirling.—*Dipl. Sco.* plate xxviii., *Scots Acts*, I. 84.

(9.) Charter by same King William, in favour of an heir-nominate.

[6 *May* 1204.]

William, by the Grace of God, King of Scots, to all worthy men of his whole realm, clergy and laity, greeting. Be it known to present and future, that Uchtred of Bingouer, in my presence, and

in my full court, when I had restored to him the land of Bingouer as his own right and heritage, acknowledged that he had no other heir nearer than Malcolm, Earl of Fife; and he made him his heir in my full court, presented him to me, and seased him in that heritage. Wherefore, be it known to present and future, that I have granted, and by this my charter confirmed, to the foresaid Earl Malcolm, the foresaid land of Bingouer by its right marches, and with all its just pertinents: To be holden to him and his heirs of me and my heirs in feu and heritage, quietly, fully, and honourably: Rendering thereform the rent which to that land pertains, towit, four chalders of oatmeal, and four merks, and four pair of or eight shillings; and performing the forinsec service which to that land belongs. Witnesses, Oliver, my chaplain, &c. At Kinghorn, the 6th day of May.—*Scots Acts*, I. page 68*. *From the original in the General Reg. House.*

(10.) Charter of Resignation by the Abbot and convent of Kelso, of the lands of Easter Duddingston.

[*Between* 1221 *and* 1226.]

To all the sons and faithful of holy mother church, Herbert, by the Grace of God, Abbot of Kelso, and the convent of same place, eternal greeting in the Lord. Be it known to present and future, that we, with the common consent of our chapter, have given, granted, and by this our present charter confirmed to Reginald Wood and his heirs, the whole land of Easter Duddingston by its right marches, with all its pertinents, which Richard the son of Hugh quit-claimed in our chapter for himself and his heirs for ever: And the same Reginald and his heirs shall hold the foresaid land of us, in meadows and pastures, in mills and waters, and the other easements of right belonging to the foresaid land of Easter Duddingston, with half the peat moss of Cameron, freely and quietly in fee and heritage; rendering to us year by year for the foresaid land, ten merks of silver at two terms, five towit at the nativity of St. John the Baptist, and five at Martinmas; and performing forinsec service to the lord the King, and to us, so far as pertains to the third part of one town: But Reginald himself and his heirs shall not make a permanent alienation of the foresaid land, or of part thereof, nor impignorate the said land, or the half of it, without our leave or assent. Witness the chapter—witnesses

also these, Sir William Wood, chancellor, Sir Nees of Ramesay, Sir Michael of Wymeth, &c.—*Regr. of Kelso, No.* 456.

(11.) Original Charter by the Abbot and Convent of Dunfermline, for the grantee's homage and service, and twelve merks yearly.

[*Circa* 1270.]

To all who shall see or hear this writing, Simon by the Grace of God, Abbot of Dunfermline, and the convent of same place, eternal greeting in the Lord. Be it universally known that we with common consent and assent of our whole chapter, have given and granted to Thomas of Betherf, knight, and to his lawful heirs that he shall have of his body, for his (or their) homage and service, our whole land of Bendauchin, with all its just pertinents and right marches; in moors and marches, plains, fishings, pools, and mills, and with all the easements pertaining to the said land; freely, quietly, fully, and honorably; saving to us those (privileges) which belong to the crown of the Lord the King, and the forfeitures and claims which exceed (the value of) a cow and a sheep: Rendering therefor to us and our monastery year by year, at two terms in the year, twelve merks sterling, towit, six merks at Whitsunday and six at Martinmas, and performing forinsec service if it ought to be done. And if it shall happen that the said land of Bendauchin shall at any time be augmented by any adjoining parcel of land, by recognition or by de-ambulation, the foresaid Thomas and his heirs shall have such parcel of land at feufarm, according to what it may be worth by the estimation of honest men. In testimony whereof we have caused the seal of our chapter to be set to this writing.—*Regr. of Dunf.*, No. 317.

(12.) Personal Bond by the Vassal for the said twelve merks yearly.

To all who shall see or hear this writing, Thomas of Betherf, knight, son of Alan of Betherf, eternal greeting in the Lord. Be it universally known that I and my lawful heirs that I shall have of my body, are bound to the abbot and convent of Dunfermline, for payment of twelve merks year by year for ever, at two terms in the year, to be made in the monastery of Dunfermline, from the land

of Bendauchin, which we hold of them for our homage and service; towit, six merks at Whitsunday and six at Martinmas, as in our charter which we have from them is more fully contained. But if I or my heirs shall at any term foresaid desist from payment of said *ferm* beyond the 15th day, we shall each week so long as we desist, pay two shillings of silver to the tomb of St. Margaret the Queen, at Dunfermline, in name of penalty: Subjecting me and my heirs to the jurisdiction of the Bishop and Dean of Dunkeld for the time being, that they, if need be, may compel us by ecclesiastical censure to the foresaid observances; and renouncing for me and my heirs every exception, cavil, kingly prohibition, and all remedy of law which might be available to me and my heirs, or hurtful to the said abbot and convent. In testimony whereof I have set my seal to this writing, together with the seals of the Lord Bishop of Dunkeld, and of the Dean of same place, and of the abbot and convent of Scone.—*Idem*, No. 318.

(13.) Receipt to the Abbot and Convent of Kelso, for a Letter of Acknowledgment which they had granted to supply the loss of the prior written Titles of the lands of Draffane. (N.B.—The old Castle of Craignethan on these lands, the Tillietudlem of *Old Mortality*.)

[*July* 1271.]

To all who shall see or hear these letters, Hugh of Crawford, knight, and Alice his spouse, Greeting in the Lord everlasting. Be it universally known that we in the year of grace 1271, on the day of St. James the Apostle (25th July) have received from our masters, Henry, by the grace of God, Abbot of Kelso, and the convent of same place, a letter sealed with the seal of the chapter of Kelso, of which this is the tenor:—"To all who shall see or hear these "letters, Henry, by the grace of God, Abbot of Kelso, and the con- "vent of same place, Greeting in the Lord everlasting. Be it uni- "versally known that we, in the year of grace 1271, found Sir "Hugh of Crawford, knight, and Alice his spouse, in possession of "the land of Draffane, with its pertinents, which they had at the time "of the granting of this letter: Rendering therefor yearly to us "two merks and a half of silver, half towit at the nativity of St. "John the Baptist, and the other half at Martinmas, and perform-

" ing to us homage and fidelity, and a suit at our court, and finding " one man and a half towards forinsec service. We also find the " said Sir Hugh and Alice his spouse having a court of Bloodwit, " and of Burdensac, and of other such small matters. In testimony " whereof we have appended our seal to the present letters. Given " at Kelso on the day of the blessed Mary Magdalene (22d July) " in the year foresaid." And in testimony of the receipt of this letter, I, the foresaid Hugh, and Reginald, my son and heir, have appended our seals—and whereas the said Reginald had not a proper seal, therefore Sir Simon Fraser at his request appended his seal.—*Kelso, No.* 474.

(14.) Procedure before King John Balliol and his Parliament, on the application of Robert Bruce (afterwards King Robert the Bruce), to be admitted to do homage for the Earldom of Carrick, as his mother's heir.

The procedure took place on Monday 3d August 1293, being the first *lawful* day after the festival of St. Peter *ad vincula*. Robert was just nineteen years of age, having been born on 11th July 1274. His father, the competitor's son, had on 9th November 1292 (just three days after Edward of England had decreed that Bruce should take nothing in the competition with Balliol, but had not yet pronounced his final award), renounced in Robert's favor all right to said Earldom belonging to him by courtesy, as the surviving husband of the late Countess. But it would appear that Balliol declined to receive Robert's homage, because his father had not used the formality of resigning the Earldom in the King's own hands; and though Robert surrendered to him such right thereto as he had obtained from his father, and offered to find sureties for the relief payable to the king, and other sureties that his father would resign in due form, he was desired to return after the sheriff of Ayrshire should take sasine on behalf of the king, and should ascertain the amount of the relief which fell to be paid. According to Lord Hailes, young Bruce met with a favorable reception. The reader will,

I humbly apprehend, be at no loss what judgment to form on the case, after perusing the following literal version of the minutes of procedure. Balliol was undoubtedly entitled to the relief duty, on acknowledging the right of the young earl—and from the directions given to the sheriff he evidently contemplated exacting the full amount—but that was all he could ask—he was not entitled to seize the earldom as in non-entry, because it would have been most unjust to have attempted to construe the renunciation which the widower had made in his son's favor, as conferring a right on the king which otherwise would not have belonged to him. The sheriff of each county was collector of the Crown's revenue from the Crown vassals within the county.

[3 *Aug.* 1293.]

Robert of Brus, son of Robert of Brus, Earl of Carrick, came before the Lord the King in his Parliament at Stirling, saying that he has his father's resignation of the whole Earldom of Carrick, which was part of his mother's heritage, whose heir he is; which resignation is in these terms:—"To the magnificent and serene "Prince, Lord John, by the Grace of God illustrious King of Scot- "land, Robert of Brus Earl of Carrick, Greeting in the author of "salvation. Whereas I have granted and resigned, and for ever "quit-claimed, to Robert of Brus, my son and heir, the whole Earl- "dom of Carrick, with its pertinents, and also all the other lands "in Scotland, which I at any time held or was entitled to hold "in right of Margaret,* late Countess of Carrick, my spouse, his "mother, as the right and heritage of the said Robert, my son and "heir, I, by these presents affectionately require and beseech your "highness that you would graciously deign to admit the homage "of the foresaid Robert, my son and heir, as the true and rightful "chief of the foresaid Earldom; and, in order that this may be "done effectually and openly, I transmit to your magnificence the "present letters-patent, sealed with my seal. Given at Berwick- "upon-Tweed, on the Sunday next after the festival of St. Leonard "the Confessor, in the year of our Lord 1292." And he requests

* Lord Hailes calls her Martha.

the Lord the King to receive his homage for the foresaid Earldom. And whereas, by the accustomed laws of the kingdom of Scotland, it is expedient that the Lord the King have sasine of the said lands before he can accept the homage, therefore the foresaid Robert of Brus, the son, delivered into the hands of the said Lord the King such like sasine as he had of the foresaid lands, and found sureties for the relief of the foresaid Earldom, namely, Donald, Earl of Marr, (and) James the Steward of Scotland, each of whom bound himself in full: And moreover he found sureties, namely, the Earl of Lennox, John of Soules, and Gilbert of Carrick, that the Lord the King should receive a writing made in due form, regarding his father's resignation of the said Earldom; so, towit, that within six weeks after his father's arrival in England or Scotland, he shall deliver to the Lord the King the foresaid Writ of Resignation. The sheriff of Ayr is charged to take sasine of the said Earldom of Carrick, (as) in the hand of the Lord the King. And it was said to the foresaid Robert that he may (then) come to make his homage, and may bring the sheriff's letter that the Lord the King had sasine of the foresaid Earldom peacefully. The sheriff is also charged that he cause be extended all the lands and tenements, in what manner soever held, as well in domain as in vassalage, and even all the lands of the free-tenants of the Earldom of Carrick.—*Scots Acts*, I. p. 93.

(15.) An original feudal grant by said King John Balliol, for the grantee's homage and service.

[21*st November* 1295.]

John, by the Grace of God, King of Scots, to all worthy men of his whole realm, greeting. Know ye that we have granted, and by this our present charter confirmed to William of Silksurth (Silkyswrth) our servant, for his homage and service, ten merks of land with the pertinents, in the tenement of Colbainstown, until we shall elsewhere provide the said William with as much land in a competent place; to be holden and to hold, to the said William, and the heirs of his body lawfully begotten, of us and our heirs in fee and heritage, with all just pertinents, liberties, and easements, belonging or that can belong thereto, freely and quietly, fully and honourably; performing therefor to us and our heirs, our forinsec service, so far as pertains to the said ten merks of land. Witnesses,

William Earl of Ros, Andrew Fraser, David of Beton, and Gilbert of Haia, knights. At Stirling, the 21st day of November, in the 4th year of our reign.—*Raine's North Durham, No.* 78.

(16.) Charter by Sir William Wallace to Alexander Skirmisher (Scrymgeour) of *inter alia* the office of commandant or constable of the castle of Dundee.

The grantee in right of his ancestors then held and exercised another heritable office—that of standard-bearer in the royal army of Scotland. Both offices continued with his descendants *in the male line*, till the death on 23 June 1668 (without issue) of John Scrymgeour, Earl of Dundee, *the last lineal heir-male*, when they were seized by King Charles II, as *ultimus hæres-masculus jure coronæ*, and afterwards bestowed along with such of said Earl's estates as were destined to heirs-male, on Charles Maitland (Lord Hatton), younger brother of the Duke of Lauderdale.

[29 *March* 1298.]

William Walays, knight, Guardian of the kingdom of Scotland, and leader of the army thereof, in name of the most excellent prince, Lord John, by the Grace of God, illustrious King of Scotland, by consent of the community of the same kingdom, To all worthy men of said kingdom, to whom the present writing shall come, eternal salvation in the Lord. Be it known to all of you, that we, in name of our foresaid lord the King of Scotland, by the consent and assent of the grandees of said kingdom, have given and granted, and that same gift and grant have by the present charter confirmed, to Alexander, called Skirmischur, six merks of land in the territory of Dundee, towit that land called the Upperfield, near the town of Dundee, on the north side thereof, with those acres in the Westfield which used to belong to the royal patrimony, near the town of Dundee on the west side thereof; and also the royal meadow in the foresaid territory of Dundee; and also the constabulary of the castle of Dundee, with its pertinents liberties and advantages, without any reservation;—for homage to be done to the foresaid lord the king, and his heirs or successors, and for the aid and faithful service conferred on the foresaid kingdom, in carrying the royal

standard in the army of Scotland at the time of the granting of these presents: To be holden and to hold to the foresaid Alexander and his heirs, of our foresaid lord the king and his heirs or successors, freely, quietly, entirely, peacefully, and honorably for ever, with the whole pertinents, liberties, and advantages belonging or that may or can anywise belong in future to the said land, the foresaid meadow, and the foresaid constabulary: Performing therefor yearly to the lord the king, and his heirs or successors, to wit, for the foresaid land, meadow, and constabulary, with their pertinents liberties and advantages, the service which appertains to the said constabulary only; for all that can be exacted therefrom in future. In testimony whereof, the common seal of the foresaid kingdom of Scotland is appended to the present writing. Given at Torphichen, the 29th day of March, in the year of Grace 1298.—*Dipl. Sco.* plate xliii., *and Scots Acts*, I., page 97*.

On inspecting the fac-simile to be found at either of the above references, it will be seen that the seal appended by Wallace was no other than that of the ill-fated Balliol. Consequently it cannot be true that he had carried it to England, and that it was found in his possession in July 1299, when about to be sent abroad. It is altogether incredible that the brave Wallace and his associates would make use of a counterfeit, knowing at the same time that the genuine seal was in Balliol's possession, and might be wrested from him, and displayed in King Edward's court, to their utter confusion. But it better falls within our province to mention, that the seal so used by Wallace must have passed afterwards into the hands of the three joint-guardians chosen by the patriotic lords, after Balliol had been shipped off for Normandy; as it is a fact that the same Alexander Scrymgeour obtained during their guardianship two charters, bearing to be granted, not by them, but by John, King of Scots—the first dated the 11th day of July in the 9th year, and the second the 20th day of June in the 10th year of his reign—[1301 *and* 1302.] By the first, after reciting the verdict of a certain inquest regarding the accustomed emoluments and privileges enjoyed by the constable, Balliol seemingly confers the said office with

its emoluments and privileges. By the second, as if the charter by Wallace had never been heard of, the quondam king seemingly makes an original grant of same lands and same office verbatim, as in Wallace's charter, with the following altered reddendo ; " pro homagio et servitio nobis et suc- " cessoribus nostris faciend. et portando vexillum nostrum in " exercitu nostro." It thus appears that Scrymgeour is first rewarded for carrying the royal standard, and next he is taken bound to carry it, in return for the reward. But the office itself of standard-bearer, which he inherited and held without any written title, is not contained in any grant in his favor. It is however expressly contained in a charter granted after said Alexander's death, in favor of Nicholas Scrimgeour his heir, which also contains the lands of Hilsfield, South Borland, and Mairsfield, or Maryfield, within the barony of Inverkeithing in Fife—(probably not now known by these names)—and here the reddendo suffers another change, viz., finding two sufficient men, " ad arma" (accoutred for war), to carry the king's standards in his army, for whom the king and his heirs shall find horses, " ad arma." This charter was dated 12th March, in the 18th year of the king's reign (12th March 1323-4). In a subsequent age the obligation on the crown was changed to a salary of £40 payable from the treasury.

The above-mentioned facts will not, I should hope, be deemed foreign to the elucidation of the nature of the ancient Scottish charter. They clearly show one remarkable peculiarity, that when a vassal already in possession on a written title obtained a new charter, it usually (except in the case of a pure confirmation) bore the appearance of being an original grant, as if the parties concerned reckoned it superfluous to advert to time past, and directed all their attention to the time to come—just as, now a days, is the case when a tenant on the expiry of his lease obtains a new one. But we are not to infer that Alexander Scrymgeour, a warrior by profession, would regard Wallace's charter as entirely superseded by those he had obtained from the joint-guardians in name

of King John. On the contrary, there is every probability that he still set a high value upon it. In December 1303, he obtained, doubtless in consequence of special application, from the Earl of Carrick (still Bruce the younger, his father being yet in life) a precept in his own name as one of the guardians of Scotland, and in the name of John Comyn the younger, his co-guardian (the third having previously retired from office), directed to the Sheriff of Forfar and his bailies; narrating that he, Scrymgeour, had been infeft and seased in the constabulary of the castle of Dundee, and in certain lands adjacent to the said town, *by the gift of Sir William Wallays*, and commanding and charging them to place and establish him in said lands and office, in the same state in all respects as he held them by the gift of the said William, formerly guardian of the said kingdom.*

(17.) Original Feu-charter of a piece of land within the Burgh of Glasgow, by Alan the Sacristan, in favor of Sir John of Carrick, the Parochial Chaplain of said Burgh.

N.B.—This specimen is not selected for anything internally remarkable about it, further than that it corroborates two facts which may be shrewdly guessed at from various other documents,—1st, that in ancient times lands within the limits of a burgh were often granted in feufarm, though no written evidence thereof now remains; and 2d, that charters of church lands were often not entered in the church-registers till long after, probably many years after they were granted.

[*Circa* 1300.]

To all who shall see or hear these letters, Alan, Perpetual Vicar of the Church of Glasgow, and Sacristan of the same Church, Greeting. Be it universally known, that I, with consent of the Chapter of the said Church, have for me and my successors, sacristans, granted, and to feufarm let, in name of the said office, to Sir

* See Note B at the end of the volume—*Additional particulars regarding the said two heritable offices.*

John of Carrick, *then* parochial chaplain of Glasgow, that whole land which *was then* vacant, with all its pertinents, lying within the burgh of Glasgow, opposite the land of the Preaching Friars of Glasgow, in length and breadth between the land of Malcolm, called Scot, on the north, and the vennel or lane belonging to the said friars on the south: To be holden and to hold, to the said Sir John, and his heirs and assignees, freely quietly and peacefully for ever. Rendering therefrom yearly to me and my successors, sacristans, three shillings of silver, towit 18 pennies at Whitsunday, and 18 pennies at Martinmas; and so on, from year to year and term to term, payment shall be made of the said feufarm for ever. And I, Alan, and my successors, sacristans, shall warrant and defend the said land with its pertinents, to the said Sir John and his heirs and assignees, against all men and women for ever. In testimony whereof, I have set my seal to the present letters, and for the greater security of the transaction, I have procured the seals of the officialty and community of Glasgow to be hereto appended. Witnesses, John Dubber, and John the son of Waldef, *then bailies* of Glasgow, &c.—*Reg. Glasg.*, No. 254.

CHAPTER VIII.

PRACTICE IN THE TIME OF KING ROBERT THE BRUCE.

DURING the first six or eight years of his reign, Scotland was in such a disturbed state that there must have been few such transactions as it is the purpose of the charter to record; but in the course of the subsequent years of his reign, Robert must have granted a considerable number of charters. In his time it was the custom to preserve, in the national archives, copies upon long rolls, sheet pasted to sheet, and written only or for the most part on one side; and such appears to have been the practice during the whole of the fourteenth and part of the fifteenth centuries. But many of these record-rolls are now believed to be irretrievably lost.

From Robertson's Index it appears that about the year 1629, there were extant eighteen or nineteen of the Rolls of Robert the Bruce, containing about 700 entries, all of which rolls, save one containing ninety-four entries, have unaccountably disappeared. That roll, and such of those of our other kings before James I, as are still extant, were published in 1814, at the expense of Government, under the title, *Registrum Magni Sigilli.* Copies of many valuable charters, of which the records are now lost, may still be found in the manuscript collection of the first Earl of Haddington, and in the Registers of Kelso and Melrose, &c. and doubtless a few originals may yet be lying in the charter-chests of some of our ancient families. I have only here to add, that many of Robert's charters were on forfeitures, and that he seems to have granted very few charters of confirmation.

It is impossible to assign any date to more than two of the entries in Robert's single extant Roll, because unfortunately all its other entries break off abruptly after the *cujus rei testimonium*. Of the few following selected specimens of the practice in his time, some have been taken from that Record-roll. The rest have been obtained from other sources.

(1.) Original grant by the King to an ancestor of the Duke of Argyle, containing a rather singular reddendo:—

[10*th February* 1314-15.]

Robert, by the Grace of God, King of Scots, to all worthy men of his whole realm, Greeting. Know ye that we have given, granted, and by this our present charter, confirmed to our beloved and faithful Colin (Campbell) knight, son of Neil Campbell, for his homage and service, the whole land of Loch-Awe, and the land of Ardskodnish, with the pertinents: To be holden and to hold to the said Colin and his heirs of us and our heirs in fee and heritage, and as one free barony, by all the right meiths and marches thereof, in wood and plain, meadows and pastures, moors and marshes, peat-mosses, roads and paths, in waters, pools, and mills, and with advocations of churches—with huntings and fowlings, and with all other liberties, commodities, advantages, and just pertinents, as well not named as named, as freely and quietly, fully and honorably as our other barons in Argyle hold or possess their baronies of us: Finding to us and our heirs the said Colin and his heirs, for the said lands, a galley of forty oars in our service, with all its pertinents and men sufficient, at the expense of the said Colin and his heirs for forty days, as often as he or they shall be forewarned: And when we shall have a mind to conduct our army by land, the said Colin and his heirs shall do forinsec service for the said barony, just as our other barons of Argyle should do for their baronies. In testimony whereof we have ordered our seal to be set to our present charter. Witnesses, Bernard Abbot of Arbroath, our chancellor, &c. At Arbroath, the 10th day of February, in the 9th year of our reign.—*Dipl. Sco.*, plate xlvii.

(2.) Grant of the lands of Bathgate, Riccarton, Ratho,

and various other lands, and two annualrents, to Walter the High Steward of Scotland, on the occasion of his marriage to Marjory Bruce, the King's daughter.

[*June or July* 1315.]

Robertus Dei Gratia Rex Scottorum omnibus probis hominibus totius terræ suæ salutem. Sciatis nos dedisse concessisse et hac præsenti carta nostra confirmasse Waltero Senescallo Scotiæ dilecto et fideli nostro in liberum maritagium cum Marjoria filia nostra Baroniam de Bathket cum terra de Ricardtoñ, Baroniam de Rathew terram del Bernys juxta Lythcu cum terra quæ vocatur la Brome prope Lacum ejusdem Terram de Bondington cum terra de Eryngarth juxta Lythcu, Terram de Galowhille juxta Lythcu, annuum redditum de Cars Stryvillyn quam Abbas et conventus Monasterii Sanctæ Crucis de Edenburg tenent de nobis, annuum redditum centum solidorum percipiendum de terra de Kynpunt, et terram de Edinghame in vicecomitatu de Rokesburg. Tenend. et habend. eidem Waltero et hæredibus suis inter ipsum et dictam Majoriam procreandis, de nobis et hæredibus nostris in feodo et hæreditate, per omnes rectas metas et divisas suas libere quiete plenarie et honorifice, una cum libere tenentibus serviciis eorundem bondis bondagiis nativis et eorum sequelis molendinis multuris cum omnibus aliis libertatibus commoditatibus aysiamentis et justis pertinentiis suis tam nominatis quam nominatis ad dictas Baronias et terras cum redditibus spectantibus seu de jure spectare valentibus in futurum: Faciendo inde nobis et hæredibus nostris dictus Walterus et hæredes sui prædicti servitia debita et consueta secundum naturam Infeodationis liberi maritagii. In cujus rei testimonium præsenti cartæ nostræ sigillum nostrum præcipimus apponi. Testibus venerabilis patribus Willo Willo et Nicholao Sancti Andreæ Dunkeldensis et Dumblanensis ecclesiarum episcopis Bernardo Abbate de Abyrbrothoc Cancellario nostro, Patricio de Dunbar Comite Marchiæ, Thoma Ranulph Comite Moraviæ Malcolmo Comite de Levenax, Jacobo Domino de Douglas Gilberto de Haya Constabulario Scotiæ Roberto de Keth Marescallo Scotiæ, militibus, et aliis.—*From the Original in the General Register House.*

Or,

Robert, by the Grace of God, King of Scots, to all worthy men

of his whole realm, Greeting. Know ye that we have given, granted, and by this our present charter confirmed, to our beloved and faithful Walter, the Steward of Scotland, in free marriage-gift with Marjory our daughter, the barony of Bathgate, with the land of Riccarton, the barony of Ratho, the land of Barns near Lithgow, with the land called the Broom, near the loch thereof; the land of Bonnington, with the land of Eringarth, near Lithgow; the land of Gallowhill, near Lithgow; the annualrent of the Carse of Stirling, which land the Abbot and convent of the monastery of the Holyrood of Edinburgh hold of us; an annualrent of one hundred shillings, to be uplifted from the land of Kinpunt; and (lastly) the land of Ednam, in the sheriffdom of Roxburgh: To be holden and to hold, to the same Walter and his heirs to be procreated between him and the said Marjory, of us and our heirs, in fee and heritage, by all their right meiths and marches, freely, quietly, fully, and honorably, together with the services of the free tenants thereof, the native bondmen and bondwomen and their progeny, mills, multures, with all the other liberties, commodities, easements, and just pertinents, as well not named as named, belonging or that can of right belong to the said baronies, lands, and annualrents in future: Performing therefor to us and our heirs, the said Walter and his heirs foresaid, the services due and accustomed, agreeably to the nature of an infeudation of free marriage-gift. In testimony whereof we have ordered our seal to be appended to our present charter. Witnesses, the Venerable Fathers William, William, and Nicolas, Bishops of the churches of St. Andrews, Dunkeld, and Dumblane, Bernard, Abbot of Aberbrothoc, our Chancellor, Patrick of Dunbar Earl of March, Thomas Randolph Earl of Moray, Malcolm Earl of Lennox, James Lord of Douglas, Gilbert of Haya, Constable of Scotland, Robert of Keith, Marshal of Scotland, knights, and others.

(3.) Charter of Donation of the land of Belton, which had been forfeited to the Crown, and had been held by the forfeited person of a subject-superior.

Robert, &c. Know ye that we have given, granted, and by this our present charter confirmed to our beloved and faithful Adam More, knight, the whole land of Belton, with the pertinents, which at this turn belongs to us by reason of forfeiture: To be holden

and to hold, to the said Adam and his heirs, of the chief lord of that fee, in fee and heritage, by all its right meiths and marches, freely, quietly, fully, and honorably, with the services of the free tenants of said land, and with all its liberties, commodities, advantages, and just pertinents: Performing therefor the said Adam and his heirs, to the chief lord of the foresaid fee the service due and accustomed. In testimony whereof, &c.—*Reg. Mag. Sig.*, No. 4.

The above-mentioned lands were not bestowed to be holden of the Crown, but of the immediate feudal-superior—for although they were forfeited to the Crown by the subvassal's rebellion, the Crown vassal could not be deprived of his right of superiority, if he continued stedfast in his allegiance. In such case, however, it behoved the Crown to appoint a donator, because it was incompatible with the dignity of royalty to be a subject's vassal. In a subsequent age a different form was adopted. A precept was issued from Chancery, directing the subject-superior to receive and invest the Crown's donator in room of the forfeited sub-vassal.

In ward-holding, it was so far well that a superior was not responsible for the loyalty of his vassals—neither ought they in reason or in justice to have been held responsible for his loyalty—but the aristocracy was then all-powerful—the rights of their subordinates were held in no estimation. When a great man was convicted of rebellion, all his vassals immediately ceased to have any legal right to their possessions, unless the King out of mere grace and favor chose to allow them to remain. In the above example, the grant of the services of the free tenants shows that the forfeited sub-vassal had vassals under him (though these might or might not have written titles), and that it was the King's pleasure that they should not be disturbed.

(4.) Original grant of a twenty-pound land of Lamberton, forfeited by the last Crown-vassal.

Robert, &c., Know ye that we have given, granted, and by this our present charter confirmed, to our beloved and faithful Laurence

of Abernethy, for his homage and service, the land of Lamberton, which belonged to Ingram of Gynes, knight, to the extent with the pertinents of a twenty pound land: To be holden and to hold, to the said Laurence and his heirs, of us and our heirs, in fee and heritage, by all its right meiths and marches, freely, quietly, fully, and honorably, with all its liberties, commodities, easements, and just pertinents: Performing therefor to us and our heirs, the said Laurence and his heirs, the service of two archers in our army, and suit and presence, at our Court of the Sheriffdom of Berwick, at the several courts to be held there. In testimony whereof, &c. —*Reg. Mag. Sig.*, No. 6.

This example shows that there was then a recognised measure of the military service to be performed, according to the yearly value of the land. Here the land was worth £20 per annum, and the grantee was to equip two archers to serve in the royal army for the usual period (40 days) at his expense. The next article in the same volume is a grant of a £5 land, and the grantee was to furnish half an archer, that is, one archer for half the legal period.

(5.) Another original grant, also on forfeiture, of the lands of Bedrule, in the County of Roxburgh.

Robert, by the Grace of God, King of Scots, to all worthy men of his whole realm, Greeting. Know ye that we have given, granted, and by this our present charter confirmed, to our beloved and faithful James of Douglas, knight, for his homage and service, the whole land of Bethocrulle, in Teviotdale, with the pertinents, which belonged to the late John Comyn, knight: To be holden and to hold, to the said James and his heirs, of us and our heirs, in fee and heritage, as freely and quietly, fully and honorably, with all its liberties, commodities, easements, and just pertinents, as the said late John, or any of his predecessors, at any time held or possessed the said land most freely, quietly, fully, and honorably: Performing to us and our heirs, the said James and his heirs, the service due and accustomed for the said land, in the time of the Lord Alexander of good memory, King of Scotland, our predecessor last deceased. In testimony whereof, &c.—*Idem*, No. 12.

(6.) The next example shows that a yearly money payment, besides the proper quota of military service, was not incompatible with ward-holding.

Robert, &c. Know ye that we have given, granted, and by this our present charter confirmed, to our beloved and faithful James of Cunningham, knight, for his homage and service, the whole land of Hassindean, with the pertinents, in the county of Roxburgh: To be holden and to hold, to the same James and his heirs, of us and our heirs, in fee and heritage,—in free barony—by all its right meiths and marches, as they were in the time of the Lord Alexander of good memory, King of Scots, our predecessor last deceased; in woods and plains, meadows and pastures, roads, paths, moors and marshes, waters, pools, parks and mills, with huntings, fowlings, and fishings, and with all its other liberties, commodities, easements, and just pertinents, as well not named as named, as freely and quietly, fully and honorably, as our other barons in the foresaid county hold or possess their baronies of us, most freely, quietly, fully, and honorably; saving to us the due service of the tenants of said land: Rendering therefor yearly to us and our heirs, the said James and his heirs, eleven pounds of sterlings, at the terms of Whitsunday and Martinmas, by equal portions; and performing the forinsec service of half a knight, and suit and presence at our court of Jedburgh. In testimony whereof, &c.—*Idem*, No. 13.

(7.) Charter by the Scottish King, conferring the Earldom of Carrick on his brother Edward.

Robert, &c., Know ye that we have given, granted, and by this our present charter confirmed, to Edward of Bruys, knight, our beloved brother, for his homage and service, the whole Earldom of Carrick, by all its right meiths and marches: To be holden and to hold—to the said Edward and the heirs-male of his body, and their heirs-male, proceeding and only by the direct and male line continuously descending, unless in case there shall be a plurality of surviving brothers-german, in which case the eldest deceasing or failing without heirs-male procreated of his body, the second begotten shall succeed to him, heritably in the said Earldom, and so of the others and their heirs,—of us and our heirs in fee and

heritage; with the name, right, and dignity of Earl, and with all the other liberties, commodities, easements, and just pertinents belonging, or that can anywise belong, to the said Earldom,—as freely and quietly, fully and honorably, as the said Earldom used to be held most freely, quietly, fully, and honorably, by any one whomsoever, in the time of the Lord Alexander of good memory, King of Scots, our predecessor last deceased: Performing to us and our heirs, the said Edward and his heirs foresaid, the service for the said Earldom due and accustomed in the time of the said Lord Alexander, the king: And if there shall happen to be a failure (which fate forbid), in the succession of heirs foresaid in manner above declared, we will that the said Earldom shall revert to us and our heirs freely and entirely, and without any diminution. In testimony whereof, &c.—*Idem*, No. 45.

(8.) Grant of Douglasdale and Kirkmichael, to James of Douglas, showing that in pure blench-holding homage was due, but no manner of service.

Robert, &c., Know ye that we have given, granted, and by this our present charter confirmed, to James of Douglas, son and heir of William of Douglas, knight, for his homage, the whole land and tenement of Douglasdale; as also the whole land and tenement of Kirkmichael, by these marches, towit: beginning at the Cairn of Tinto, &c., To be holden and to hold, to the said James and his heirs or assignees, of us and our heirs in fee and heritage, and in free barony; with advowsons of churches, and all the freetenants and native men thereof; in all and through all; and with all the pertinents, liberties, and easements belonging or that can anywise belong to the said lands and tenements: We, moreover, will and grant, for us and our heirs, that the said James, and his heirs or assignees, shall have and hold the foresaid lands and tenements, free in all respects from all manner of distraints, attachments, and petitions whatsoever; so that none of our officers shall intermeddle in any matter within the foresaid marches, except only concerning articles specially belonging to our crown: Rendering—he and his heirs or assignees to us and our heirs—for wards, reliefs, marriages, escheats, suits of court, and for all other terrene services and demands, as well not named as named, which can be exacted or demanded by

any one whomsoever, from the said lands and tenements,—one pair of gilt spurs at Lanark, on Christmas day, in blench-farm only. In testimony whereof, &c.—*Idem*, No. 77.

(9.) Charter on a sale, granted by a Lady in presence of a provincial council of the Scottish clergy, containing a conveyance of the lands, a discharge for the price, a formal ratification, a resignation immediately thereafter in the king's hands, in face of Parliament, a new investiture by the king in favor of the purchaser, and an obligation of warrandice by the seller—all in one deed—yet containing no mention of the *modus tenendi*, or of the *reddendo*, or yearly return or acknowledgment to which the king had right as immediate superior.

[10*th July* 1321.]

To all sons of Holy Mother Church who shall see or hear the present writing, Agnes of Morthington, daughter and heiress of Sir Peter of Morthington, knight, Greeting in the Saviour of all. Be it universally known that I, not from force, fraud, or fear, but spontaneously, purely, and simply, for me, my heirs and successors whomsoever, have sold to John, the son of Adam Bruning, and in his person by title of sale have transferred the whole land of Gillanderston, in Garioch, with all the pertinents, liberties, and easements whatsoever, belonging or that can anywise belong to the said land, even as if it were needful to make special mention thereof, for 360 merks of good and legal sterlings to me by hand paid; of which sum of money I acquit the said John by these presents, and renounce thereanent the exception that might be set up of uncounted money or fraud: And to this to be faithfully and inviolably observed, I have taken my bodily oath, in the hands of the venerable father Sir William of Lamberton, by the Grace of God Bishop of St. Andrews; and besides have sworn, the holy evangelists touched, in presence of the whole prelates in council assembled, at Perth on the 9th day of July, in the year 1321, that I shall keep my said sale firm and unshaken forever, for myself and my heirs and successors, nor shall come against the same by myself or any one else directly or indirectly in future: And if it

happen that I or my heirs or successors are placed in opposition either in law or fact to the foresaid sale, in something I or they cannot help, I oblige myself and my heirs and successors to pay to the said John, his heirs successors and assignees, two hundred pounds of sterlings, before ever the same John, his heirs successors or assignees, shall be under any obligation to answer to me or my heirs successors or assignees, in anything relating to the foresaid land; and furthermore to pay one thousand pounds of sterlings, as well to the fabric of the cathedral church of the district of St. Andrews, as to that of the cathedral church of Aberdeen. And in order that my present sale and transference may obtain full firmness of strength from abundance of the law, I have in a full parliament held at Perth day and year foresaid, renounced, resigned, and surrendered, with staff and baton, in the hands of the most serene Prince, Lord Robert by the Grace of God illustrious King of Scots, the whole foresaid land of Gillanderston, with its sundry pertinents foresaid: And the said lord the king, both as King of Scotland, and as heir of Sir Robert of Bruys, of good memory, overlord of the foresaid tenement of Gillanderston, has purely, simply, and freely conferred the said land and tenement with its pertinents, as said is, on the foresaid John, and his heirs and assignees, and has infefted him in the said land, and invested him therewith. And to all the sundry premises to be without fraud observed, I oblige me and my heirs, successors, assignees, and executors, and all our goods, moveable and immoveable, wherever they shall be found, without offering any obstruction. And I and my heirs, successors and assignees, shall warrant and for ever defend the foresaid land, with its pertinents, to the foresaid John and his heirs, successors, and assignees. And I renounce by the oath I have taken the exception of intended fraud, and all action and exception on the fact, which by letters Episcopal, Royal, or Papal, impetrated or to be impetrated, might be alleged of circumvention to the extent of more than half the just price, and every other remedy, as well of canon as of civil law, whereby the efficacy of these presents could be anywise impaired. In testimony whereof I have in presence of the foresaid prelates, set my seal to the present letters. And because my seal is less known, I have procured the seals of the venerable fathers, Sirs William of Lamberton, William of Saint Clair, Henry of Cheyne, John of Kinninmont, and Ferchard Beleraumb, by the Grace of God Bishops of St. Andrews, Dunkeld, Aberdeen, Brechin, and

Caithness, and of the noble lords, Gilbert of Haya, Constable of Scotland, and Robert of Keith, Marshal of the same, to be set to these presents. Given at Perth the 10th day of the month of July, in the year of our Lord 1321.—*Reg. Mag. Sig.*, No. 84, and *Scots Statutes*, Vol. I. p. 118.

(10.) Charter of Alienation by a seller to a purchaser, in a shorter form.

[*Circa* 1327.]

To all who shall see or hear this charter, Walter Shakloc, Greeting in the Lord everlasting. Know ye that I have given, granted, and by this my present charter confirmed, to Henry of Rossy, and his heirs or assignees, my whole land of Inianey, with the pertinents, towit, the third part of that same town, for a certain sum of money fully and honestly paid to me in my great and urgent necessity. To be holden and to hold, to the said Henry and his heirs or assignees, freely and quietly, fully and honorably, by all the right meiths and marches, in fee and heritage, in roads and paths, in moors and marshes, in waters and pools, in meadows and mills, and with all the other liberties, commodities, and easements belonging or that can anywise belong to the said land in future. Performing therefor the due and customary service of the Lord the King, so far as pertains to the said part of the foresaid land of Inieney. And I the forenamed Walter and my heirs shall warrant, acquit, and for ever defend the said land with the pertinents, as aforesaid, to the said Henry, and his heirs and assignees, against all men and women. In testimony whereof I have set my seal to my present charter. And for the greater security, because my seal is of no great authority, I have procured to be set hereto the seal of the venerable father Sir John, by the Grace of God Bishop of Brechin, together with the seals of the noble lord, David of Graham, senior, and of the discreet men, Alexander of Kininmont, Archdeacon of Lothian, &c.—*Reg. de Aberbrothoc*, App., No. XII. [*See Brief and retour regarding the same lands of Inianey alias Annanie*, pp. 6 and 7 *hereof.*]

(11.) Crown Charter of Confirmation of the above.

[21*st Sept.* 1327.]

Robert, by the Grace of God, King of Scots, to all worthy men

of his whole realm, Greeting. Know ye that we have granted, and by this our present charter confirmed, that donation which Walter Shakeloc made to Henry of Rossy, of a third part of the land of Inyanee, with the pertinents: To be holden and to hold to the same Henry and his heirs and assignees, of us and our heirs in fee and heritage; by all its right meiths and marches, with all and every its liberties, commodities, easements, and just pertinents, as freely and quietly, fully and honorably, as the charter of the foresaid Walter thereupon granted, in itself justly and more fully sets forth and testifies,—Saving our Service. In testimony whereof, we have ordered our seal to be set to our present charter. Witnesses, Bernard, Abbot of Abirbrothoc, our Chancellor, &c. At Arbroath, the 21st day of September, in the 22d year of our reign.—*Idem*, No. xiii.

(12.) Crown Charter of Resignation of another portion of the same land.

[23*d May* 1327.]

Robert, &c. Know ye that we have given, granted, and by this our present charter confirmed to our beloved and faithful Henry of Rossy, the whole land of Inyoney with the pertinents, within the sheriffdom of Forfar, which Augustin the son of Christian surrendered and resigned to us by staff and baton, at Dumbarton, on the 17th day of March, in the year of Grace 1326, before the nobles of our kingdom then there present. To be holden and to hold, to the same Henry and his heirs, of us and our heirs in fee and heritage, by all its right meiths and marches, freely, quietly, fully, and honorably, with all its liberties, commodities, easements, and just pertinents: Performing therefor to us and our heirs, the said Henry and his heirs, the service due and accustomed. In testimony whereof, &c. At Berwick-upon-Tweed, the 23d day of May, in the 22d year of our reign.—*Idem*, No. xi.

(13.) Crown Charter of Confirmation in the short form, confirming, 1st, a Feu-right after the death of the granter and grantee; and 2dly, a Ratification or Renewal of the Feu-right by the heir of the granter to the heir of the grantee.

[14*th April* 1329.]

Robert, &c. Know ye that we have granted, and by this our present charter confirmed, that Donation which William of Maule, knight, Laird of Panmure made to Ralph of Dundee, knight, of the lands of Banevyn and Balrotheri (Benvie and Balruddery) with the advocation of the church thereof, and the mill, and all their other just pertinents; also the Ratification, Approbation, and Confirmation, made by Henry of Maule, knight, son and heir of the foresaid William of Maule, to John of Glassirth (Glaister) son and heir of the foresaid Ralph of Dundee, of the lands, the advocation of the church, the mill, and all the other just pertinents foresaid. To be holden and to hold, to the same John and his heirs or assignees, of the foresaid William and Henry, and their heirs in fee and heritage, by all their right meiths and marches, with all their liberties, commodities, easements, and just pertinents, as freely and quietly, fully and honorably, as the charter of the foresaid William, and the confirmation of the foresaid Henry thereupon granted, in themselves justly and more fully set forth and testify. In testimony whereof, we have ordered our seal to be set to our present charter. Witnesses, Walter of Twynam our chancellor, Thomas Randolph Earl of Moray, Lord of Annandale and Mann, our nephew, James Lord of Douglas, Gilbert of Haya our constable, Robert of Keith our marshal of Scotland, and Robert Boyd, knights. At Dundee, the 14th day of April, in the 24th year of our reign.—*Dipl. Sco.* plate xlix.

Before commencing a new chapter, I trust that, though it cannot be reckoned a feudal form, I shall be forgiven for inserting here a literal version of a very curious grant by the same king to the monks of Melrose, in the 20th year of his reign. It is noticed by Sir Walter Scott in a note to chapter xvii. of the second volume of the *Monastery*.

[10*th January* 1325-6.]

Robert, by the Grace of God, King of Scots, to all worthy men of his whole realm, Greeting. Know ye that we, for the welfare of our soul, and for the welfare of the souls of our ancestors and successors, kings of Scotland, have given, granted, and by this our

present charter confirmed, to God and the Blessed Virgin Mary, and to the religious men, the abbot and convent of Melrose, and their successors for ever, one hundred pounds sterling of annual-rent to be uplifted year by year from our Old Customs of the burgh of Berwick-upon-Tweed, at the terms of Whitsunday and Martinmas, by equal portions, or from our New Custom of the foresaid burgh, if our foresaid Old Customs shall not suffice for the said sum of money; or from our New Custom of our burghs of Edinburgh and Haddington, if our Old and New Customs of the town of Berwick, in any case happening, shall not suffice thereto; so that the said sum of one hundred pounds shall be paid to them yearly, fully and entirely, without any contradiction, in preference to all other assignations whatsoever by us made or to be made,—for finding for ever, day by day, to each monk of the foresaid monastery who takes his meals in the refectory, one sufficient dish, of Rice cooked with Milk, or of Almonds, or Pease, or other nutriment of the like kind found in the country; and that dish shall perpetually be called the King's Dish: And if any monk from any honest cause shall be unwilling to eat of the said dish, or cannot be refreshed by it, the said dish shall nevertheless be furnished to him, and may be carried off for the poor at the gate of the monastery: Neither is it our desire that the dinner of the said convent, wherewith from of old they used commonly to be served or supplied, shall be anywise diminished or made of an inferior quality, on account of our foresaid dish. Moreover, it is our will, and we ordain that the abbot of the same monastery, for the time being, with consent of the most healthy of the convent, shall specially appoint one provident and discreet monk, for receiving, distributing, and expending the whole sum of the above-mentioned money, for the utility of the convent, conform to the intention and desire of our heart above noted, and for rendering a faithful account before the abbot and elders of the convent, year by year, of the money so received. And we will that the said religious men, to perpetuate our memory for our foresaid donation, shall for ever be bound to feed and clothe fifteen poor persons at Martinmas yearly; delivering to each of them on the same day, four ells of cloth, thick and broad, or six ells of narrow cloth, and to each of them one pair of new sandals of their own sort. And if the said religious men shall any year fail in the premises or any of the premises, it is our will that that which shall be unperformed

shall be doubled, on occasions most needful, at the sight of our Head Forester of Selkirk for the time being; and that the said duplication shall be made before the Christmas day, next following the foresaid term of Martinmas. In testimony whereof, we have ordered our seal to be appended to our present charter. Witnesses, the venerable fathers in Christ, William, John, William, and David, by the Grace of God, bishops of the churches of St. Andrews, Glasgow, Dunkeld, and Moray; Bernard, abbot of Aberbrothoc, chancellor, &c. At Aberbrothoc, the 10th day of January, in the 20th year of our reign.—*Liber de Melros*, No. 362.

CHAPTER IX.

PRACTICE DURING THE REMAINDER OF THE FOURTEENTH CENTURY.

THE examples, Nos. 11 and 13 of the immediately preceding chapter, are specimens of the confirmation-charter then in use. Of such, judging from the *Registrum Magni sigilli*, and the other scanty sources of information yet left to us, King Robert I, as already noticed, must have granted very few. David II, his son and immediate successor, granted many short charters of confirmation, and many also in a more ample form—for in his time the practice was introduced, or rather began to become pretty general, of transcribing into the superior's charter the deed of alienation thereby confirmed,—in some such mode as this:—"Sciatis nos vidisse et "diligenter intellexisse quandam cartam, non rasam," &c., or "Noverit quod diligenter inspeximus quandam cartam," &c., which may be thus rendered: "Be it known that I have care-"fully examined a certain charter granted by A to B, and "have seen that it was not erased, or defaced, or vitiated, or "in any respect liable to suspicion, containing the tenor fol-"lowing:"—[Here transcribed *ad longum*]—"which charter, "and the donation therein contained, in all and sundry its "points, articles, conditions, modes, and circumstances what-"soever, form also and effect, in all and through all, I ratify, "approve, and for me and my heirs for ever confirm." By this form of confirmation, which gradually obtained the preference, and before the middle of the 15th century superseded almost entirely the shorter form, the duplicates of many pre-

cious deeds of alienation have been preserved, whereof the originals have long since perished. Numbers 3, 5, 6, 7, 8, 9, 10 and 12 of the examples to be cited in the present chapter (all versions of course), have been obtained from the respective Crown charters of Confirmation, into which the originals had been so transcribed.

It is perhaps scarcely correct to say, that the above-mentioned practice *began* to be introduced in the time of David II, as it was not altogether unknown at an earlier period. In the Register of the Episcopate of Glasgow, we find an instance (No. 274) of a confirmation in the full form, by King Robert the Bruce, in September 1323. The writing thereby confirmed is not an alienation or conveyance, but a Deed intended to secure a perpetual annualrent of £10 to the Rector of the Church of Ayr, to be uplifted from the lands therein mentioned, or to be paid half-yearly by equal portions by the proprietor of these lands. The annualrent so constituted was not a proper feudal subject. The confirmed Deed contains no *modus tenendi*, and no *reddendo*, and was perhaps transcribed without remark into the charter of confirmation, just because it was easier to do so, than to give an intelligible description of it.

The reign of David II, who was only in the 6th year of his age when his father died, was a long one—nearly forty-two years. Of feudal grants or transmissions during his minority, few vestiges remain. In the twenty-third year of his age, and eighteenth of his reign, he was taken prisoner at the battle of Durham, 17th October 1346, and not liberated till eleven years thereafter. All the *record-rolls* of his charters, which, according to Robertson's Index, contained more than 900 entries, are lost; but there yet remains a *record-volume*, containing about 270 of David's charters. It probably includes all that ever were recorded of the writs under his seal, within the last eight or nine years of his reign. In all of these, and in all the extant Parliamentary proceedings after his release, the current year of his reign is short-stated. In every instance (save one, 4th March 1363-4, where the

greater deviation occurs)—in every instance I say where materials exist for detecting mistakes, the *cardinal* number of the years he had reigned is set down as the *ordinal* of the regnal year then current. This inaccuracy, doubtless *originating* in pure accident, having been once committed, seems to have been persisted in to the last. It first appears in the Ratification by David after his return of the formal treaty previously entered into for his enlargement—which ratification bears that his seal was thereto appended, at Scone, in full council, on 6th November 1357, in the *twenty-eighth* year of his reign.—[*Scot's Statutes*, vol. i. p. 158.] The mistake cannot be accounted for on the supposition that David's reign had been held to commence at the date of his coronation, 24th November 1331, instead of that of his father's death, 7th June 1329; because in such case the discrepancy would have been much greater. The learned Mr. Ruddiman was the first to observe various discrepancies which he could not reconcile.—[*Preface to Dipl. Sco.* p. 40, note C.] I beg also to refer the reader to an excerpt from a letter of the late Mr. Thomas Thomson, to the late Sir Harris Nicolas, written when he had not the materials before him, which would have satisfied him of the accuracy of the few documentary dates yet extant, within the period preceding the captivity.—[*Chronology of History*, p. 381.] That errors existed was also noticed more than fifty years ago by the late Mr. William Robertson, editor of the Index. Nevertheless, in assigning what he supposed the proper date to some charters granted by King David, on the *twelfth* day of June, in the fifteenth year of his reign, he overstated the year of the Christian era, 1344 instead of 1343, in consequence of having fallen into the very mistake which had led to the under-statement of the regnal year in November 1357. This (somewhat abridged) was his method: "As "King Robert I, father of David II, died on the *seventh* of "June 1329, the fifteenth year of his reign *began*" (he should have said *terminated*) "on the *seventh* of June 1344."

It will not be necessary to adduce many examples in illustration of the practice from 1329, till the end of the century,

because little remarkable occurred during that period, or even till some few years after its close, when we find certain tokens of the introduction of the *tenendas a me de superiore meo*, the origin of which shall form the subject of the next chapter.

(1.) The following is a fine specimen of a Charter of Resignation by a subject-superior, in the beginning of David's reign, except perhaps that it shows a tendency to run into verbosity.

[*Circa* 1330.]

To all who shall see or hear this my charter, John of Maxwel, knight, Laird of Carlaverock, Greeting in the Lord. Know ye that I have given, granted, and by this my present charter for ever confirmed, to my lovite Alexander Maitland, for his good counsel and aid afforded to me, That my whole land of Pencaitland, within the county of Edinburgh: which land with the pertinents Alice of Pencaitland, daughter and heiress of the late John of Pencaitland her father, freely of her own accord resigned to me, and by staff and baton purely and simply surrendered: To be holden and to hold, my said whole land of Pencaitland with its pertinents, to the said Alexander his heirs and assignees, of me my heirs and assignees, heritably, freely, quietly, peacefully, and honorably, by all its right marches, old and divided, with all liberties, commodities, easements, just rights, and whole other pertinents whatsoever, as well under ground as above, as well not named as named, belonging or that can by any right, title, or custom whatsoever belong to the said land with the pertinents in future: Rendering therefor yearly the said Alexander his heirs and assignees, to me my heirs and assignees, one silver penny at Whitsunday at the said land of Pencaitland, in name of blench farm if asked—in lieu of all other secular services, exactions, and demands which can anywise be exacted or required by me my heirs and assignees, from the said Alexander his heirs and assignees, for the said land with the pertinents. And I, John of Maxwel, knight, my heirs and assignees, shall warrant, acquit, and for ever defend that whole land to the said Alexander, his heirs and assignees, against all men and women present and future. In testimony whereof, my seal is appended to my present charter. Witnesses, Sirs William Vaus, &c. knights, and many others.—*Liber de Dryburgh*, p. 270.

(2.) Original grant of a mill and mill-lands, to be holden blench of the granter, but to be subject to an annualrent of 13s. 4d. (then tantamount to eight ounces of silver coin) to the Cathedral Church of Aberdeen. From the address it may fairly be inferred that the church's interest in the grant was deemed greater than that understood to remain with the granter as superior.

[12*th January* 1344-5.]

To all sons of Holy Mother Church to whom the present letters shall come, John of Bonavilla, knight, eternal Greeting in the Lord. Be it known to all of you, that I have given, granted, and by this my present charter confirmed, to my beloved squire, Alexander the meat-carver, for his service faithfully rendered to me, the whole mill of Mundurnach entirely, with a piece of land lying near the said mill, on which he can set up a sufficient house with a competent yard, a decent barn (*honestus*) with a suitable barn-yard; also two acres of land lying near the said mill on the east side towards the sea; with the free water-run already formed and used, and with all the other pertinents, commodities, and easements, multures and sundry fruits and pastures, belonging or that can by whatever right belong to the said mill: To be holden and to hold, to the same Alexander, his heirs and assignees, of me and my heirs and assignees, freely, peacefully, honorably, well and in peace, without any contradiction of me or my heirs or assignees: Rendering therefrom yearly the foresaid Alexander, his heirs and assignees, to the church of the Blessed Mary of Aberdeen, thirteen shillings and four pennies of sterlings, at Whitsunday and Martinmas by equal portions, and to me and my heirs and assignees, one silver penny at Whitsunday if asked only—for all other secular service, exaction, or demand to be made therefor. And I, the foresaid John, my heirs and assignees, shall warrant and defend my foresaid donation to the said Alexander, his heirs and assignees against all mortals. In testimony whereof, I have set my seal to my present charter; at Balhelvy, the 12th day of January, in the year of Grace 1344.—*Reg. Episc. Aberd.* i. p. 75.

(3.) Grant of the Estate of Aberdour, to be held of the

granter in the same manner as held by him of his immediate superior.

[*7th April* 1351.]

To all who shall see or hear this charter, William of Douglas Lord of Liddesdale, Greeting in the Lord everlasting. Know ye that I have given, granted, and by this my present charter confirmed, to my beloved nephew James of Douglas, my whole land of Abirdowyr in the sheriffdom of Fife, with all the just pertinents belonging to the said land, by all its right meiths, paths, and marches: To be holden and to hold, to the said James and his heirs of me and my heirs, in fee and heritage, as freely, quietly, fully, entirely, and honorably, as I at any time held or possessed the said land; in woods, meadows, plains, pastures, pools, mills, multures, waters, fishings, as well in sea-water as in fresh-water, huntings, fowlings, courts, and escheats, and in all the other liberties, commodities, and easements belonging or that can by any right belong to the said land of Abirdowyr, as well not named as named: Rendering therefrom yearly to me and my heirs, the foresaid James and his heirs, due and accustomed service, or the same service prescribed to me in my infeudation in the foresaid land, if required, in lieu of all exaction, custom, or demand. And I, the said William and my heirs, shall warrant, acquit, and for ever defend the foresaid land with its whole pertinents, in all and through all, as above set forth, to him and his heirs, against all men and women. In testimony whereof my seal is appended to this present charter. Witnesses, the reverend fathers, &c. at Dalkeith, the 7th day of April, in the year of our Lord 1351.—*Confirmed by David II, on* 14*th December* 1366, *Reg. Mag. Sig.* p. 52, No. 156.

One of the witnesses to the above charter was the granter's elder brother of the same name—William of Douglas, but not then, at least not on that occasion, distinguished by any territorial dignity, namely, his illegitimate brother.

(4.) Charter of Confirmation by John the Graham—or a renewal by him of two original grants by his grandfather—as full and special as if the Deeds thereby confirmed had been therein engrossed. In order probably to show he was not a *Laird* merely but a *Lord*,

he uses the regal style *we*, *us*, and *our*, long previously assumed by all prelates, and even by some ecclesiastics of less elevated station, but seldom by a Laic-superior under the rank of an Earl.

[*Circa* 1360.]

To all who shall see or hear this writing, John of Graham (de Gram) Lord of Torbolton and of Robertston in Conyggam, Greeting in the Lord. Know ye that we have seen and carefully examined the charters, not vitiated, nor in any part defaced, to Henry of Graham our uncle, of the lands of Manerston and of Philipston in the Barony of Abyrcorn, and of the land of Blyth in Tweeddale, which the said Henry had and held by the gift of Sir John of Graham, his father and our grandfather; which charters and donations we for us and our heirs ratify and for ever confirm to the said Henry our uncle, and his heirs and assignees, in all points: To be holden and to hold, to the said Henry and his heirs and assignees, freely and quietly, with all their pertinents and easements, as well below ground as above, as well named as not named, and exempt from ward and relief, and all other exactions and demands which could at any time be exacted or required, on account of the said lands, by us or our heirs, from the said Henry and his heirs and assignees, or from the men dwelling upon the said lands: We also will and grant to the said Henry, his heirs and assignees, for us and our heirs, that any amercement whatever of them or their men shall not exceed four pennies: Rendering yearly he and his heirs and assignees, to us and our heirs, for the land of Blyth two gilt spurs, or, at the pleasure of the said Henry and his heirs and assignees, 12 pennies of Sterlings, in name of fee-farm, and one penny only for the lands of Manerston and Philipston in name of fee-farm, year by year at Martinmas, for all and sundry that could at any time be exacted or required or demanded from the said lands by us or our heirs: And we and our heirs shall warrant and defend the said lands to him and his heirs and assignees for ever. In testimony whereof we have set our seal to the present writing. Witnesses, Sirs Alexander of Mowbray, Alexander of Setoun, Godfrey of Ross, Robert of Lawadyr, knights, John of Malvyl, John Prater, William of Cornal, and many others.—[*Oldest Writ of the lands of Blyth in the county of Peebles—still in perfect preservation.*]

The grantee was the granter's *father's* brother, *patruus, not mother's* brother, *avunculus ;* but the latter word, the one made use of in the above charter, was then and had long been in Charter-Latin, of just the same indefinite import as its English derivative. Earl Henry, son of King David I, made use of the same word *avunculus*, in reference to his father's brother King Edgar.—[*Raine's North Durham*, No. 109.]—I have never observed the word *patruus* in any really ancient charter.

(5.) Charter of some lands in Sutherlandshire, by William (Fourth) Earl of Sutherland, brother-in-law of David II, in a still more regal style than that of John the Graham, seeing that he thereby conferred the highest baronial prerogatives.

[*Circa* 1360.]

To all who shall see or hear this charter, William Earl of Sothirland, eternal Greeting in the Lord. Be it universally known that we have given, granted, and by this our present charter confirmed, to our beloved brother Nicholas of Sothirland, for his faithful homage and service to us rendered and to be rendered, sixteen davachs of land lying within the Earldom of Sothirland, in the free barony called Torboll, viz., three davachs of Torboll, one davach of Remarkar, &c. To be holden and to hold, to the foresaid Nicholas and the heirs of his body, lawfully procreated and to be procreated, of us and our heirs, purely and in free barony for ever ; in moors, marshes, woods, plains, pastures, meadows, paths, roads, fishings, huntings, fowlings,—in pools, waters, turf-diggings, peat-mosses, mills, smitheries, breweries,—with sok and sak, tholl and theam, pit and gallows, infangandthief, and all other commodities, courts, pleas, and complaints ; and with the natives of the same land ; and with all the liberties, commodities, and easements belonging or that can anywise belong in future to the said barony in Torboll, as well not named as named, as well under ground as above : Rendering therefrom yearly to us and our heirs, the foresaid Nicholas and his heirs, the service of one knight, for all service, exaction, or demand whatever. And we the foresaid William and our heirs shall warrant, acquit, and for ever defend the foresaid

barony of Torboll, with the pertinents, liberties, and easements, to the foresaid Nicholas and his heirs against all men and women. In testimony whereof, &c. Given at Aberdeen the 13th day of September.—[*Confirmed by David II, on 17th October* 1363, *Reg. Mag. Sig.* p. 26, No. 36.]

(6.) Charter by a proprietor on an excambion.

[*Circa* 1360.]

To all who shall see or hear this writing, Alexander of Elfinston proprietor thereof, Greeting in the Lord. Know ye that I have given, granted, and by this my present writing confirmed to Alexander More, son of the late Sir Alexander More, knight, in excambion for a certain piece of land in Erthbeg which I lately had there, and for a certain sum of money, to me fully by hand paid, my whole land of Kythumber with the pertinents within the barony of Stenhouse; which land with the pertinents Sir Godfrey of Ross late proprietor thereof gave in fee and heritage to Alexander of Elfinston my late father: To be holden and to hold, the whole foresaid land of Kythumber with the pertinents, to the foresaid Alexander and his heirs and assignees, of me and my heirs and assignees in fee and heritage, freely, quietly, peacefully, and honorably, as I or my father anywise held or possessed the said land with the pertinents most freely and quietly; with all the liberties, commodities, and easements belonging or that can anywise by law belong to the said land in future, without any reservation: And if (which fate forbid) the said land of Kythumber with the pertinents shall be got back again by form of law or any other process, whereby the said Alexander More, his heirs and assignees, shall less peacefully enjoy the said land with the pertinents, I oblige me, my heirs and assignees, with all our goods, moveable and immoveable, either to deliver back to the said Alexander More, his heirs and assignees, my whole land of Erthbeg, which I had in excambion for the foresaid land of Kythumber, or at least to make good to the said Alexander More his heirs and assignees, as much land in my tenement of Elfinston as the said land of Kythumber used anciently to be worth. Which land with the pertinents, I the foresaid Alexander, and my heirs and assignees, shall warrant, acquit, and for ever defend to the foresaid Alexander More his heirs and assignees, against

all men and women. In testimony whereof, &c.—[*Confirmed*, 4*th June* 1363, *Idem*, p. 27, No. 40.]

(7.) Charter of Wadset.

[29*th July* 1364.]

Be it known to all men by these presents that I John of Levyngston of Drumry, have impignorated and in Wadset transferred to Simon Chepman, burgess of Lanark, these two (third) parts of the land of Banks and Brierybanks belonging to me within the territory of Lanark, and the two acres of arable land presently in his hands, one lying within Little Feronflat, and the other within Nine-acres, for 12 pounds of sterlings to me by hand fully paid by the same Simon. To be holden and to hold, to the said Simon his heirs and assignees, of me and my heirs, freely, quietly, fully, well and in peace, without any reservation; with all and sundry, liberties, commodities, easements and just pertinents belonging or that can anywise belong to the foresaid lands: Rendering therefrom yearly, the said Simon or his heirs and assignees, to me or my heirs or assignees, six pennies of silver only, at the two terms of each year, towit Whitsunday and Martinmas, by equal portions, in name of ferm if asked, in lieu of all other exactions and demands which can therefrom be exacted or required, until I the said John my heirs or assignees, shall pay the foresaid sum of money to the foresaid Simon his heirs or assignees, towit twelve pounds of silver fully, either gradually or all at once. I also will and grant (if it happen that I in any manner alienate the said lands), that the said Simon shall be the nearest (by privilege) to have the said lands, for as much or for less than any other person shall be willing to give for them. And I the foresaid John and my heirs shall in the meantime as aforesaid warrant, acquit, and for ever defend the foresaid lands with the pertinents, to the said Simon his heirs and assignees, against all men and women. In testimony whereof, I have set my seal to these presents, at Lanark, on the Monday next before the festival of St. Peter *ad vincula*, in the year of our Lord 1364. Witness the community of Lanark, with their common seal hereto appended.—[*Confirmed*, 22*d August* 1367, *Idem*, p. 56, No. 170.]

The precision of the above seems worthy of special notice.

Nothing is left to doubt or conjecture. The lender was to retain the lands till repaid, and in the meantime (except the elusory acknowledgment of three silver pennies half-yearly to the borrower as his feudal superior) was neither to be liable for rent, nor entitled to interest.

(8.) Crown Charter of Resignation—showing that an *unentered* heir-apparent might competently sell or transfer to a third party, even ward-lands, by resignation in the hands of the Superior.

[2*nd October* 1367.]

David, by the Grace of God, King of Scots, to all worthy men of his whole realm, clerical and laical, Greeting. Know ye that we have given, granted, and by this our present charter confirmed, to our beloved and faithful Adam Pingle, the whole land of Longforgan with the pertinents, within the sheriffdom of Perth, which belonged to the late Alexander of Dunfermline, and which Euphemia of Dunfermline, cousin and heiress of the same late Alexander, to us before the senators of our kingdom, in our Parliament held at Scone, on the 28th day of September, in the year of our Lord 1367, by her true and lawful procurators, by staff and baton surrendered, purely and simply resigned, and with all right and claim which she had or could have in the said land, for herself and her heirs wholly quit-claimed for ever: To be holden and to hold, to the foresaid Adam and his heirs and assignees, of us and our heirs in fee and heritage, by all its right meiths and marches, with all and sundry liberties, commodities, easements, and just pertinents whatsoever, belonging or that can anywise justly belong to the said land in future; as freely, quietly, fully, entirely, and honorably, in all and through all, as the charter of our progenitor made regarding the same land to the late John, clerk of Dunfermline, father of the said late Alexander, in itself at more length justly contains and sets forth: Performing therefor the service due and accustomed. In testimony whereof, &c. At Scone, the 2d day of October, in the 38th (meaning 39th) year of our reign.—*Idem*, p. 57, No. 175.

(9.) Charter of alienation of an Earldom, for a price

paid ; to be holden as the seller held it, that is, of the seller's superior—the Crown.

[*8th February* 1371-2, *time of King Robert II.*]

To all who shall see or hear this charter, Thomas Fleming Earl of Wigton, Greeting in the Lord everlasting. Know ye that I not by force or fear induced, nor by error misled, but of my pure free will firmly resolved, in my great, urgent, and inexorable necessity, and especially because of great and grievous discords and deadly animosities lately arisen between me and the ancient natives of the foresaid Earldom, have sold and by title of sale for ever granted, to a noble and potent man Sir Archibald of Douglas, knight, Lord of Galloway on the east side of the water of Cree, my whole foresaid Earldom of Wigton with the pertinents; and have purely, simply, absolutely, and for ever transferred to the foresaid Archibald, all right and claim competent, or that might anywise be competent in future to me my heirs or assignees in the said Earldom with the pertinents, for a certain considerable sum of money to me by hand paid in my foresaid great and urgent necessity; of which sum I confess me well and entirely paid: To be holden and to hold, to the foresaid Archibald his heirs and assignees, in fee and heritage, by all its meiths and marches, in meadows, grazings, and pastures, moors, marshes, roads, paths, waters, pools, mills, multures, with bond-servants and thralls, and their progeny, fowlings, huntings, and fishings, and with advocations of churches, with pit and gallows, sok and sak, toll and teme, infangandthief and outfangandthief, with fees, forfeitures, and escheats, wards, reliefs, and marriages, tenandries and services of free tenants; as also all and sundry other liberties, commodities, easements, jnst pertinents, and free customs, belonging or that can by any right or title whatsoever belong to the said Earldom; as freely and quietly, fully and honorably, entirely, in all and through all, as I the foresaid Thomas most freely, quietly, fully, entirely and honorably, held and possessed the said Earldom of Wigton, or any of my predecessors held and possessed the said Earldom: In testimony whereof my seal is appended to these presents. Given at Edinburgh, the 8th day of February, in the year of our Lord 1371.—Witnesses, Walter, by the Grace of God, Abbot of Holy-Wood, William Monypenny, Rector of the Church of Cambuslang, &c.—

[*Confirmed by Robert II on 7th October* 1372—*Reg. Mag. Sig.* p. 114, No. 5.]

(10.) A sale of Ward-lands to be held Blench of the seller.

[10*th March* 1389-90.]

To all who shall see or hear this charter, William of Faffynton, proprietor of Malcolmston, Greeting in the Lord everlasting. Know ye that I have sold, and by title of sale alienated, and also sell, alienate, and by my present charter confirm, to my dearest friend John of Douglas, burgess of the Burgh of Edinburgh, all and whole my lands, of late called Malcolmston, with the pertinents, within the Sheriffdom of Edinburgh, between on the one side the lands of Riccarton on the south, and on the other side the lands of Herdmanston on the north, for a certain sum of money, to me in my manifest and urgent necessity, kindly by him in hand paid, and to my use converted; of which sum of money I hold me well content and satisfied, acquitting thoroughly the foresaid John, his heirs and assignees for ever: To be holden and to hold, the foresaid lands with the pertinents, to the foresaid John, his heirs and assignees, of me my heirs and assignees in fee and heritage for ever, without any reservation, by all their right meiths and marches, in length and breadth, as well under ground as above; in woods, plains, meadows, grazings, and pastures, moors, marshes, waters, pools, roads, paths, mills, and their sequels, plantations, fishings, fowlings, huntings, smitheries, breweries, bond-slaves, native thralls, fugitives, and their progeny, with courts and their escheats, and with all and sundry other liberties, commodities, easements, and just pertinents whatsoever, belonging or that can by any right whatever belong to the foresaid lands, with the pertinents in future: Rendering therefrom yearly, the foresaid John his heirs and assignees, to me my heirs and assignees, on the foresaid lands, at Whitsunday, one penny of silver, in name of blench-farm if asked only; in lieu of all manner of wards, reliefs, marriages, exactions, customs or demands whatsoever, which could be exacted or required by me my heirs or assignees, from the said lands with the pertinents: And I, the foresaid William, my heirs and assignees, shall warrant, acquit, and for ever defend the foresaid lands with the perti-

nents, to the foresaid John, his heirs and assignees, against all mortals: And if it happen, that I my heirs or assignees, or any other persons in our name contravene this my present charter, by word or deed, in judgment or outwith the same, or move a suit thereupon, which fate forbid, I oblige me my heirs and assignees, to the said John his heirs or assignees, in 100 pounds of good and legal sterlings, in name of damages, expenses, and interest, to be levied without forgiveness, and in 40 pounds of sterlings, to the fabric of the church of St. Andrews, to be advanced in name of penalty, before the inbringing of any suit whatsoever, the present charter nevertheless remaining in its full strength; Renouncing, moreover, for me my heirs and assignees, all kinds of remedies of canon law or civil law, all privileges, papal indulgences, royal prohibitions, and the legal maxim that a general renunciation is unavailable; subjecting myself my heirs or assignees, to the jurisdiction and coercion of the Lord-Official, of the Court of St. Andrews, and his vicegerents for the time being, that they by every ecclesiastical censure, day after day, may constrain and compel us to the observance of the premises: And, for all and sundry, these things being faithfully and inviolably observed, I have taken my bodily oath on the holy gospels of God. In testimony whereof my seal is appended to my present charter—present, John Young, then bailie of the said burgh, &c. Given at Edinburgh, the 10th day of March, in the year of our Lord 1389.—*Reg. Mag. Sig.* p. 179, No. 7.

The above was confirmed on the 18th of same month, by King Robert II, *tanquam senescallus scotiæ, salvo servitio suo*—that is, reserving the duties and services due to himself as the proper dominant superior. It related to a sale of ward-lands. But the fact that the seller's charter was confirmed so very soon after its date, plainly shows that the superior's leave had previously been obtained. It may however be asked, why did the seller grant a sub-infeudation, and by a far more favorable tenure than his own? why did he retain a mid-superiority from which he could derive no benefit, and yet consequently remain personally responsible for the services due to his immediate superior? Why did he not dispone to be held *de superiore suo?* or why did he

not rather resign in the superior's hands, and allow the purchaser to be entered by that more direct and simple form ?

To answer the last inquiry first,—the obligation of warrandice which the seller had come under,—the penal consequences to ensue in case of his attempting to infringe the sale,—his selection of a special jurisdiction for compelling fulfilment,—his renunciation of all subterfuges,—and his solemn oath,—all these important circumstances were duly put on record by the form adopted, which would not have been competent under the entry by Resignation. With regard to the other inquiries it is no great stretch of probability to suppose that the seller was not devoid of ordinary prudence, and that he was fully aware that under the then existing circumstances, he might with perfect safety allow the transaction to be managed in the way most agreeable to the purchaser. All he had to do was to continue personally responsible during his own lifetime, for the services due to the king, *tanquam senescallus*, and to bind his heirs as well as himself to warrant the sale. The seller was proprietor of other lands holden by him ward of the king, *tanquam Rex*. To these the ward-casualties would attach ; but the lands of Malcolmston would be privileged, so long as the change of ownership remained undivulged. It is quite clear, that had the purchaser entered by resignation, the seller could not have protected him or his successors against the ward-casualties ; and it may be taken for granted that in the course of time, after the death of both seller and purchaser, the Blench-holding under the seller and his immediate heirs would ultimately disappear, and be resolved into the original tenure of ward directly under the steward. In point of fact the lands are found to have been so held in the time of King James VI, by whom, out of favor, the original tenure of pure ward was changed to taxed-ward.

(11.) A Writ under the Great Seal of King Robert III, showing that in his time Ward-lands held Blench by a sub-vassal were liable in military service to the Crown :—and such indeed must have always been the

case, unless where the sub-vassal was specially privileged by a Title granted by the Crown.

[10*th July* 1391.]

Robert, by the Grace of God, King of Scots, to all worthy men of his whole realm, clerical and laical, Greeting. Know ye that by certain evidences read in our presence, we clearly understand that the lands of Ardach, with the pertinents, lying in the lordship of Rowallan, in the barony of Coninghame, within the sheriffdom of Ayr, are held of the lairds of Rowallan and their heirs in blench-farm only: Such being the case, We ratify, approve, and for ever confirm to John of Craufurd of Ardach, and his heirs for ever, the said lands of Ardach, with the pertinents, to be held in blench-farm as above noticed, instead of us and our heirs; whilst yet John himself and his heirs shall perform to us and our heirs, Kings of Scotland, the services therefrom due and accustomed. In testimony whereof, we have ordered our seal to be appended to our present charter. Witnesses, the venerable fathers, &c. at Dundonald, the 10th day of July, in the second year of our reign.—*Reg. Mag. Sig.* p. 201, No. 19.

Per No. 18, same page, Sir Adam More, four months after the above date, obtained a Crown charter of the barony of Rowallan, *pro homagio et servitio suo, impenso et impendendo.* That charter proceeded on his own resignation, made personally in presence of many of the great men of the kingdom, and included, of course, the superiority of Ardach. The old extent of the barony seems to have been 100 merks, and supposing Ardach to have been a five-merk land, John Craufurd, the sub-vassal, would have had to relieve Sir Adam of a twentieth share of the ward-services annually due to the Crown; but he was protected by the above writ in his own favor, from the terrible consequences of the barony itself falling in non-entry.

(12.) Charter by a Subject-superior, confirming a Sub-infeudation granted by a Lady to be held Blench of her and Ward of him.

[15*th August* 1390.]

To all who shall see or hear this charter, Norman of Lesly, knight, Lord of Ballenbreich, Greeting in the Lord. Know ye that by a certain inquest of trustworthy men, thereupon sworn, taken at Glenduckie on the 5th day of July, in the year of our Lord 1390, whose names are these: Andrew Ramsay of Reidie, John of Kinnear &c. we have been fully informed that the immediate predecessors of Sir John Ramsay of Colluthie, knight, were heritably infeft in the lands of Balmeadowside and Pittaup (Petachop) with the pertinents, by the late Marjory of Dunmore, lady thereof: Rendering to her and her heirs, yearly at Whitsunday, one penny in name of blench-farm if asked, and to us and our heirs the service from the said lands due and accustomed: which infeudation in all its points and articles, modes, forms, and circumstances, we for us and our heirs and successors, hereby ratify confirm and approve, in all and through all, saving our service. In testimony whereof our seal is appended to this present charter; at Ballenbreich the 15th day of August, in the year of our Lord 1390. [Confirmed by Robert III, on 7th April 1392, salvo servitio regio.]—*Reg Mag. Sig.* p. 208, No. 37.

The following gift by Robert III, though not relating to a feudal subject, is inserted here as being rather curious, and not occupying much space:

Robert, by the Grace of God, King of Scots, to all to whose knowledge the present letters shall come, Greeting. Know ye that we have granted and given to the reverend father in Christ, Gilbert, Bishop of Aberdeen our chancellor, a silver cross, wherein is contained a piece of the wood of the cross of St. Andrew the apostle; two cloths, the one towit woollen of Arras, with the story of the offering of the three Kings of Cologne to the blessed Virgin, and the other a linen cloth painted with beasts and birds; also a large church-service book, which belonged to the deceased Sir Walter, the last bishop of St. Andrews, and now belongs to us by royal right, through the death of the said late bishop; together with all right and claim which we have or could have in the same. Given under our privy seal the 4th day of May at Elliotston, in the year 1403, and of our reign the 14th year.—*Reg. Episc. Aberd.* p. 208.

CHAPTER X.

ORIGIN OF THE TENENDAS A ME DE SUPERIORE MEO.

The Registrum Magni Sigilli, already so often referred to, has recorded only two instances of the use of that form, and these do not appear till some years after the close of the 14th century. I have elsewhere seen other two instances, the one dated in October 1388, and the other in January thereafter, but am doubtful of their authenticity. Of the confirmation-charters in the above-mentioned Register, during the reigns of David II, Robert II, and Robert III, there are about forty-five that contain transcripts of the respective deeds confirmed. Had the form in question been introduced into practice prior to the end of the century, the fact would surely have been indicated by some of the deeds so transcribed. But in one and all of them the tenendas is either simply *de se*, that is, of the granter; or, *de superiore*, or *de Rege*, that is, of the granter's superior. The two instances alluded to, of the tenendas *a se de superiore*, are to be found in two confirmation-charters, not granted till some time after the death of Robert III. Both of them are in the lesser form, but they are quite clear and distinct. The first is dated 20th July 1408, in the third year of the government or regency of Robert Duke of Albany.

Robert Duke of Albany, Earl of Fife and Menteith, and Governor of the Kingdom of Scotland, to all worthy men of the whole foresaid kingdom, clerical and laical, Greeting. Know ye that we have approved, ratified, and by this our present charter confirmed, the donation grant and sale which the late John of St. Michael

made and granted to our lovite Patrick of Sanquhar, of his whole land of Muircroft with the pertinents, lying in the Barony of Polgowny within the sheriffdom of Aberdeen; To be holden and to hold, to the foresaid Patrick and his heirs, *from* the foresaid late John and his heirs, *of* the Baron of Polgowny in fee and heritage for ever, by all its right meiths and marches, old and divided, with all and sundry liberties, commodities, easements, and just pertinents whatsoever, belonging or that can belong to the said land in future; as freely and quietly, fully, entirely, and honorably, well and in peace, in all and through all, as in the charter of the said late John to the said Patrick thereupon granted is more fully contained; Saving to our Lord the king and his heirs, from the foresaid land with the pertinents, the services due and accustomed. In testimony whereof we have ordered the seal of our office to be appended to our present charter of confirmation. Witnesses, the reverend father, &c. —*Reg. Mag. Sig.* p. 236, No. 34.

The other short confirmation-charter was granted on 5th March 1409-10. It relates to an annualrent, and will serve the better to explain the nature of the tenendas in question.

Robert Duke of Albany, &c. Greeting. Know ye that we have approved, ratified, and by this our present charter, by the authority of our office, confirmed for ever, that donation and grant which Thomas Maitland, with consent and assent of William Maitland his son and heir, made and granted to our lovites, Mariot of Craig and William Watson her son, from the twenty-six shilling and eight penny land of Quilta, and from the thirteen shilling and four penny land of Grieveston, with the pertinents, lying within the sheriffdom of Peebles: To be holden and to hold, the foresaid annualrent from Quilta and Grieveston with the pertinents, to the foresaid Mariot and William, *from* the said Thomas his heirs and assignees, *of* our lord the king and his heirs in fee and heritage for ever, freely, quietly, well and in peace, with all other liberties, commodities, easements, and just pertinents whatsoever, belonging or that can belong to the said annualrent in future; Saving to the Lord the King and his heirs the service from the said annualrent due and accustomed. In testimony whereof, &c.—*Idem*, p. 241, No. 48.

The deed by Thomas Maitland, thereby confirmed, must have been a transference of a previously existing annualrent, payable to him from lands belonging to another party, and by its original constitution holden directly of the Crown. Had he been proprietor of the lands, he would have granted the annualrent to be holden of himself, and not of the Crown, especially not *ward* of the Crown,—as in the latter case, if inherited by an heir in minority, it would during such minority (possibly a long term of years), have become payable by Maitland or his successor in the lands to the Crown, or to a Donator of the Crown. It is extremely unlikely that he would have subjected lands belonging to himself to any such inconvenient contingency. On the other hand, if the lands were not his, what more natural than that he should stipulate that the annualrent was to be holden *away from him, of and under its proper superior?* It may be seen from Robertson's Index (p. 23, No. 11), that in the 18th year of Robert I (1323), Colban de Glen had an annualrent of two merks payable to him from the lands of Quilts in the county of Peebles. That Maitland's grant related to the same annualrent can scarcely be doubted.

The reader, it may be presumed, has seen enough to satisfy him that the number of Charters of Alienation containing the form of tenendas in question, granted before the period we have now reached, cannot have been great. The following has been obtained from an authentic source, namely, from its full confirmation, dated 18th February 1406-7, by the granter's feudal-superior, Robert Scott of Murdiston, Baron of Kirkurd, an ancestor of the Duke of Buccleuch. The original alienation-charter is not now extant. Possibly, as was the usual custom in ancient times, it was not preserved with the same care as the superior's confirmation; but this copy, taken from the last-mentioned writ, being the oldest extant title-deed of the estate of Ladyurd in the county of Peebles, may be relied upon as genuine and correct. Were the deed here copied still extant, I would say it is the oldest of the kind I have ever seen.

[10*th July* 1406.]

Omnibus hoc scriptum visuris vel audituris, Thomas Fraser dominus dimidiæ partis omnium terrarum de Ledyurde, filius et hæres quond. Marjoriæ de Farle, salutem in Domino sempiternam. Noveritis me non vi nec metu ductum, nec errore lapsum, sed mea mera et spontanea voluntate, utilitateque mea undique provisa et pensata, ac cum concilio consensu et assensu amicorum et consanguineorum meorum, tam ex parte patris quam ex parte matris, dedisse concessisse vendidisse et titulo venditionis alienasse, necnon concedere vendere alienare et hoc præsenti scripto meo confirmare, dilecto meo et speciali Joanni de Geddes, hæredibus suis et assignatis, Totas et integras illas terras meas, viz. dimidietatem omnium terrarum de Ledyurde prædictarum, cum pertinentiis in jure hæreditario (mihi spectan.) jacentes infra baroniam de Kirkurde vicecomitatu de Peblis, pro quadam summa pecuniæ mihi per prædictum Joannem in mea magna exigentia et urgente necessitate per manibus gratanter persolutæ, et in usum meum totaliter conversæ: *Tenend. et habend.* prædictum dimidiam partem omnium prædictarum terrarum de Ledyurde cum pertinentiis, ac omne jus clamen actionem et juris proprietatem, quæ et quas habui, habeo, &c. *prædicto Joanni* hæredibus suis et assignatis, *a me et hæredibus meis et assignatis*, in feodo et hæreditate pro perpetuo, sine aliquo retinemento, *de Roberto Scot Domino superiore baroniæ de Kirkurde et hæredibus suis*, libere quiete plenarie integre honorifice bene et in pace, per omnes illas rectas metas et divisas suas, per quas ego prædictus Thomas et prædecessores mei prædictam mediam partem prædictarum terrarum cum pertinentiis tenui et possedi, tenuerunt et possiderunt, &c. *Reddendo et faciendo inde annuatim* prædictus Joannes de Geddes hæredes sui et assignati ad terminos usuales, viz. pentecostes et sancti martini in hieme, *prædicto domino superiori et suis hæredibus servitia debita et consueta tantum*, pro omni alio onere et servitio seculari, quod de prædicta dimidia parte omnium prædictarum terrarum cum pertinentiis juste exigi poterit et requiri. In cujus rei testimonium, &c. Apud Peblis decimo die mensis Julii Anno Domini Millesimo cccc^mo. Sexto.

We have here indubitable evidence that the form in question was in use in 1406. That it may have been introduced some few years earlier I will not venture to deny; but cer-

tainly not before 1388. The material question however is, How did it originate?

On that head it may safely be averred, that if it did not appear till about the end of the 14th or beginning of the 15th century, its invention was not occasioned by any special statutory enactment, or any remarkable historical event. There seems, however, good reason to believe that it was devised of set purpose, though not in a complete form all at once. In fact it was contrived and adopted gradually, and by no means hurriedly—retarded, doubtless, by the hostility of the ancient feudal-system to pure alienations, whereby Crown vassals and others were long deterred from using any other form than that belonging to sub-infeudations, even when they considered themselves at liberty or in safety purely to transfer. Their alienation-charters, when they did venture to alienate, were at first usually granted to be holden *de se*, but with no other *Reddendo* except performing to their immediate superiors the services to which they were entitled, leaving that *modus tenendi* to resolve, as soon or late it must have done, into a holding directly of said superiors.

The insertion in a later age of the *Tenendas a se de superiore suo*, devised in reference to sales, and anciently never used except on such occasions, was a bolder measure, and three stages are perceptible before it was finally adopted—all contrived apparently by the seller or his legal adviser. The *first* was the insertion of a plain *Tenendas de superiore*, in place of the long prevailing *Tenendas de se*. This was about the year 1363. The *second* step, adopted about the year 1375, was the insertion, in that part of the Charter of Alienation which in modern phrase would be termed the dispositive-clause, of these words: *a me et hæredibus meis*—to signify that the seller transferred the lands *away from him and his heirs*, so that he should no longer have any concern with them, and that the purchaser, when he wished to obtain a feudal investiture, would have to apply to the seller's superior, and depend on him for its future renewal when requisite. In all probability that form of words was suggested to the

practitioner of those days, by the fact which he would soon learn from experience, after sales of any kind began to be tolerated—that there are some heritages which are literally incapable of being *transferred* to be holden in *subfeu*—such as rights of patronage, annualrents already constituted, and grounds or houses within a Royal Burgh—and, for the period of the first use of the *a me* form in transferring such heritages, we may safely assign as early a date as 1363. And, *thirdly*, the said expression *a me et hæredibus meis*, was carried down out of the dispositive-clause (where absurdly enough it is still retained by some modern practitioners, after the fashion of the old Juridical styles) into the *Tenendas itself*, as in the above-recited charter by Thomas Fraser in favor of John Geddes. To quote examples of the first and second stages might justly be reckoned intolerably tedious, and will readily be dispensed with; but it may be mentioned that said form of Tenendas, when fairly devised, seems to have been considered the only proper form for an alienation on a sale, and to have been strictly adhered to in practice, until the invention of the alternative *Tenendas, a me vel de me*, originating in the operation of the remarkable Scottish Statute of 1540, already repeatedly alluded to. I think it right to mention here that I have seen, in the Dunfermline Register, an instance (No. 303) of a Tenendas *a me et hæredibus meis* so very early as about the year 1230; but on the slightest consideration it is evident, there is either an error in the Register, or the *a me* is here used in the sense of *de me*—for by the charter the Grantee was taken bound to pay the Granter half a merk of silver yearly, the one half at Whitsunday, and the other at Martinmas—so that the lands thereby granted were to be holden *not away from* but truly *of and under* the Granter.

But the origin of the *Tenendas a se de superiore suo* has been ascribed to a totally different cause than the ingenuity of the seller or his legal adviser.

It was a favorite hypothesis of the late Mr. Walter Ross (afterwards adopted implicitly by the late Mr. Robert Bell,

and again so recently as 1826 by the editors of the third edition of the Juridical Styles), that about the year 1325 King Robert the Bruce "transplanted into Scotland" the Statute "*quia emptores terrarum*" of the English King, Edward I, dated in 1290, which, without expressly prohibiting sub-infeudations, effectually put a stop to them in England, by enacting that it should be lawful to every free man, that is, to every free-tenant or vassal, to sell his land at his pleasure, either in whole or in part, and that the purchaser should instantly hold of the seller's superior, and be responsible to him for the customs and services or corresponding share thereof due to him ; and that said statute, when so transplanted, though it had not the effect of abolishing, as in England, or even of interrupting the practice of granting sub-infeudations, yet gave rise to the invention for Deeds of Alienation of the *Tenendas a me de superiore meo :* nevertheless the ancient nobility of Scotland, though the statute was adopted at their special request, defeated its purposes, by insisting on the *necessity* of *confirmation* to give validity to Deeds of Alienation with that *Tenendas.*

Had Edward's Statute ever been adopted by any King or Parliament of Scotland, why did it not produce here the same effects as in England ? and how could it lead to results so widely different ?

In England the Statute of 1290 gave rise to a very simple form of alienation, termed a Deed of Feoffment, valid and effectual without the superior's aid or interference. The following is a literal version of one of the earliest of the kind :

[*4th February* 1295-6.]

Be it known to present and future, that I John Ellis of Sheldon have given, granted, and by this my present charter confirmed, to Sir William of Chernals of Bedworth, my whole meadow which I had of William of Burthate, with its ditches and hedges, &c. To have and to hold, the foresaid meadow with all its pertinents foresaid, to him the said William and his heirs and assigns, *of the chief Lords of the fee*, freely, heritably, peacefully and quietly for ever ; Rendering and performing to them the services therefrom due and

accustomed. And I the said John and my heirs and assigns, shall warrant, acquit, and for ever defend the foresaid meadow, with its ditches and hedges, and all its pertinents as aforesaid, to the foresaid William and his heirs and assigns. And for this donation, &c. Given at Oldcotenhale, on the Saturday next after Candlemas, in the 24th year of the reign of King Edward.—*Form. Angl.* No. 333.

To impress the matter the more strongly on the memory, I shall give another example of the same kind a few years later:—

[14*th July* 1312.]

Be it known to present and future that I William, son of William of Sagenho, have given, granted, and by this my present charter confirmed, to John, son of the late John of Salford, for a certain sum of money which he paid to me in hand, one acre of my arable land lying in Salford Plain, near a certain land belonging to Richard de la Mere: To be holden and to hold, the whole foresaid acre of land with all its pertinents, to the foresaid John and his heirs and assigns, *of the chief Lords of the fee:* Rendering and performing yearly to those chief Lords the services therefrom due and accustomed. And I the foresaid William, and my heirs and assigns, shall for ever warrant the whole foresaid acre of land, with all its pertinents, to the foresaid John of Salford and his heirs and assigns, against all mankind. In testimony whereof I have set my seal to this present charter: Witnesses thereto, Niel of Salford, John of Seabrook, Ralph of Salford clerk, John of the same town miller, and others. Given at Salford on the Friday next before the feast of St. Margaret the virgin, in the sixth year of the reign of King Edward, son of King Edward.—*Blackstone's Comm.* Vol. II. App. No. I.

Such continued to be the ordinary form of Alienation in England, for more than two centuries afterwards; but not a single instance can be discovered of the use of any such form in Scottish practice. It is still competent in England, but is seldom used, being almost entirely superseded by the form of conveyance by Lease and Release,—an invention originating in the operation of the Statute of Uses, 27th Henry VIII, chapter 10, and which form will probably be more parti-

cularly brought under the reader's notice in a subsequent page.

According to Mr. Robert Bell (Introduction to Treatise on Completing Title), the statute attributed to Robert I (which he terms the Scotch statute), was prevented from producing the same effect in Scotland as its prototype had produced in England, by the instrument of sasine, which he says "it will "be recollected has from the earliest period been a favourite "form of Scotch conveyancing. When, therefore, a right "was given by a seller to be held of his superior, he always "gave a precept of sasine, authorizing an infeftment to be "held of that superior; and infeftment was thereupon given "to the purchaser. But as this infeftment proceeded in name "of the superior, without his authority, that authority has "always been deemed necessary to corroborate and authen-"ticate the right in favour of the purchaser."

But unfortunately for that hypothesis, the instrument of sasine was unknown (see next chapter) till more than a century, or at least till nearly a century after the date assigned to the Bruce's pretended Statute. Moreover, it is a great mistake to suppose that sasine was ever given, or could have been given, by a vassal in his superior's name without his authority—or to suppose that all the ancient confirmations of Scottish practice applied to alienations to be holden *de superiore*. By far the greater number of those granted before the commencement of the 15th century applied to charters by vassals in the form of sub-infeudations, the then most usual mode of alienating till the practice arose of inserting a Tenendas, not *de se*, but *de superiore*.

Mr. Ross (vol. ii. p. 256) assigns the year 1300 as the date of Edward's Statute; but the statute itself bears (see statutes at large) that it was enacted on the quinsime of St. John the Baptist, in the 18th year of Edward's reign, that is, 8th July 1290. So that in 1325 that Statute had been many years in observance; and some at least of Robert's great men, who before openly adhering to him had as well as himself possessed estates in England, must have known from personal experi-

ence how it had operated; and all of them, to say the least of their conduct, acted very ungratefully, and very absurdly, if it be true that they induced him by their earnest solicitations to adopt Edward's Statute, and afterwards refused or avoided giving obedience to it. Yet so it was according to Mr. Ross,—those great men of Robert's kingdom, whilst they took advantage of the act so far as regarded its purpose to put an end to the practice of subfeuing, refused to allow any transference to be valid unless confirmed. Vassals, he says, could only alienate to be held of their immediate superiors,—"otherwise the sale was null upon the statute. The superiors, "however, refused to obey upon their part, and claimed a "power of confirming the infeftment. In short, the nobility "at last took advantage of that part of the statute which "strengthened their own interest, and refused to comply "with the other which favoured the vassal. Thus the very "law which gives complete relief to the body of the people in "England, rendered the condition of the same rank in Scotland worse than ever."

But all this is just an idle flight of fancy, alike at variance with every ascertained fact, and every extant genuine writing of that period. Various other erroneous views, and various contradictions and inconsistencies, might be pointed out in Mr. Ross's pages, in relation to the pretended statute. But would that be an agreeable task or an edifying? quite the reverse. Besides, it ought always to be remembered, that the work bearing his name was a posthumous publication, and possibly might have contained few such blemishes, had it been revised by himself, and published under his own inspection. Be that as it may, he was irreclaimably in error in everything relating to the pretended statute.

Had the great men of Scotland, at any time during the reign of Robert the Bruce, seen cause to be displeased with the conduct of their vassals, they would soon have redressed every ground of complaint at their own hands;—and had Robert been at any time disposed to grant a boon to them, or to any class of his subjects, it is very unlikely that he

would have adopted almost verbatim an old English statute, nowise consistent with the state of matters in Scotland at any given period of his reign; a statute, to wit, of his defunct inveterate foe, who on his deathbed enjoined his son and successor never to desist till he should achieve what had baffled his own efforts, the final subjugation of Scotland. This much Robert must have known, though he may never have heard of the fearful oath which, as narrated by Froissart, he caused his son to take in presence of his barons.* Lord Kames, I am perfectly aware, entertained not the least suspicion of the authenticity of Robert's pretended statute. His confidence in Sir John Skene seems to have been unlimited. But Sir John himself, nowise niggard of his certificates of authenticity, did not certify it to be authentic. On the contrary, he said concerning the collection of fragments among which he inserted it, that he had found them in old manuscript volumes of doubtful authority, in very strange places, and that as some of them were attributed to Robert I, he had classed the whole under one head, viz., "Statuta secunda Roberti primi." At least such I apprehend to be the meaning of the following note under what is titled chapter first of these excerpts, in the Latin edition of his once highly prized publication, now deservedly rated at a very low estimate:—
"Hæc statuta in veteribus libris reperiuntur, locis quidem
"alienissimis, et incerto auctore, verum quia ex illis nonulla
"ascribuntur Roberto Primo, reliqua quæ erant anonyma,
"huc transtuli."

The *statuta secunda* are not to be found in the most ancient

* The following is Sir Walter Scott's version of the story told by Froissart. "He made his son promise never to make peace with Scotland until the nation "was subdued. He gave also very singular directions concerning the disposal "of his dead body. He ordered that it should be boiled in a caldron till the "flesh parted from the bones, and that then the bones should be wrapped up in "a bull's hide, and carried at the head of the English army, as often as the "Scots attempted to recover their freedom."—*Tales of a Grandfather, First Series.* Froissart himself states that he caused his son be called in before his barons, (il fit appeler son aisné fils, par devant ses barons,) and made him swear upon the Gospels, that so soon as he should expire, his son should cause his body be boiled—and so on.

of those manuscripts from which the first volume of the Acts of the Parliaments of Scotland has chiefly been compiled. The first manuscript in which they appear is the Harleian, the tenth in the order of time. Not one of the *statuta secunda* is inserted in the above-mentioned volume; which fact is, however, as I understand, not altogether satisfactory to some scrupulous individuals, who are not disposed to consider mere rejection as equivalent to an affirmative opinion of spuriousness. But here, we have only to do with the 25th chapter in the Latin edition, or 24th in the Scottish; and I humbly apprehend that no reader can entertain the least doubt of its being spurious, who will take the trouble to compare the *quia emtores* ascribed to Robert the Bruce, with the genuine *quia emptores* of Edward I, both here shown in juxta-position :—

STATUTE OF 18TH EDWARD I.

Quia emptores terrarum & tenementorum de feodis Magnatum & aliorum in prejudicium eorundem temporibus retroactis multotiens in feodis suis sint ingressi, quibus libere tenentes eorundem Magnatum & aliorum terras & tenementa sua vendiderunt, tenenda in feodo sibi & heredibus suis de feoffiatoribus suis, & non de Capitalibus dominis feodorum, per quod iidem Capitales domini escaetas maritagia & custodias terrarum & tenementorum de feodis existentium sepius amiserunt, quod eisdem Magnatibus et aliis dominis quam plurimis durum & difficile videbatur, & similiter in hoc casu exheredatio manifesta; Dominus Rex in parliamento suo apud Westm' post pascha Anno Regni sui decimo octavo, videlicet, in quindena Sancti Joannis Baptiste ad instantiam Magnatum regni sui concessit providit & statuit,

Quod de cetero liceat unicuique libero homini terram suam seu tenementum, seu partem inde pro voluntate sua vendere. Ita tamen quod feoffatus teneat

STATUTE ATTRIBUTED TO ROBERT I.

Quia emtores terrarum, & tenementorum de feodis militum et aliorum Dominorum, in præjudicium eorundem, temporibus retroactis multoties in feodis suis sunt ingressi: In quibus liberetenentes ipsorum Magnatum et aliorum Dominorum qui terras et tenementa vendiderunt tenenda in feodis suis, sibi et hæredibus suis de feofatoribus suis, et non de Capitalibus Dominis feofatorum, per quod Capitales Domini maritagia eschetas custodias terrarum & tenementorum, de feodis suis exeuntia, sæpius amiserunt: quod Magnatibus iisdem et aliis Dominis valdè durum & difficile videbatur. Et similiter in hoc casu exhæredatio manifesta sequebatur: Unde Dominus Rex in Parliamento suo ad instantiam Magnatum regni sui, providit concessit et statuit;

2. Quod de-cætero liceat unicuique homini libero terram vel tenementum suum vendere, ad voluntatem suam; Itaque quod feofatus teneat terram

terram illam seu tenementum de Capitali domino, per eadem servicia & consuetudines per que feoffator suus illa prius tenuit.

Et si partem aliquam earundem terrarum & tenementorum alicui vendiderit, feoffatus illam teneat immediate de Capitali domino,

& oneretur statim de servicio quantum pertinet sive pertinere debet eidem Capitali domino pro particula illa, secundum quantitatem terre seu tenementi venditi, & sic in hoc casu decidat Capitali domino ipsa pars servicii per manum feoffati capienda ex quo feoffatus debet eidem Capitali domino juxta quantitatem terre seu tenementi venditi de particula illa servicii sic debiti esse intendens & respondens.

illam seu tenementum de Capitali Domino immediate per eadem servitia, & easdem consuetudines, per quæ & quas feofator illa prius tenuit.

3. Et si partem illarum terrarum seu tenementorum alicui vendiderit, feofatus teneat illam partem immediate de Capitali Domino.

4. Et oneretur statim de servitio, quantum pertinet seu pertinere debet eidem, pro particula illa; secundum quantitatem terræ vel tenementi venditi.

5. Et sic in hoc casu Capitali Domino ipsa pars servitii, per manum feofati erit solvenda, ex quo feofatus Capitali Domino juxta quantitatem terræ seu tenementi venditi, debet esse intendens & respondens.

The same presented in version :—

Whereas, in times past, purchasers of lands and tenements within the Fees of great men and others (to whom the free-tenants of those great men and others did sell their lands and tenements, to be holden in fee to them and their heirs, of the feoffers and not of the chief lords of the fees), have frequently entered within their fees to their prejudice, whereby the same chief lords have often lost the escheats, marriages, and wardships of lands and tenements belonging to their fees; which thing seemed to those great men and other lords very hard and insufferable, and moreover in this case manifest disinheritance: Our lord the king in his Parliament at Westminster, after Easter, in the 18th year of his reign, towit on the quinzime of St. John the Baptist, at the instance of the great men of his kingdom, has granted, provided, and ordained, that from henceforth it shall be lawful to

Whereas, in times past, purchasers of lands and tenements within the Fees of Knights and other lords (to whom the free-tenants of those same great men and other lords, did sell their lands and tenements, to be holden in their fees, to them and their heirs of the feoffers, and not of the chief lords of the fees), have frequently entered within their fees to their prejudice, whereby the chief lords have often lost the marriages, escheats (and) wardships of lands and tenements accruing from their fees; which thing seemed to those great men and other lords very hard and insufferable, and moreover in this case manifest disinheritance ensued: Wherefore our lord the king in his Parliament, at the instance of the great men of his kingdom, has provided, granted, and ordained,

(2.)—that from henceforth it shall be lawful to every free man to sell his land

every free man to sell his land or tenement, or part thereof at his own pleasure; yet so that the feoffee shall hold that land or tenement of the chief lord, by the same services and customs by which his feoffer held them before.

And if he sell any part of the same lands and tenements to any one, the feoffee shall hold that part immediately of the chief lord,

and shall be forthwith charged with service, so far as pertains or ought to pertain to the same chief lord for that parcel, conform to the quantity of the land or tenement sold; and so in that case the same portion of the service will fall to the chief lord, to be received by the hand of the feoffee, for the which the feoffee ought to be attendant and answerable to the same chief lord, according to the quantity of the land or tenement sold, for that parcel of the service so due.

or tenement at his own pleasure, and so that the feoffee shall hold that land or tenement immediately of the chief lord, by the same services and the same customs by which the feoffer held them before.

(3.) And if he sell a part of those lands or tenements to any one, the feoffee shall hold that part immediately of the chief lord,

(4.) And shall forthwith be charged with service so far as pertains or ought to pertain to him for that parcel, conform to the quantity of the land or tenement sold;

(5.) And so in that case the same portion of service will remain to be paid to the chief lord by the hand of the feoffee, for the which the feoffee ought to be attendant and answerable to the chief lord, according to the quantity of the land or tenement sold.

With reference to the case of a partial sale, where the purchaser was to be liable for a corresponding share of the personal services due to the superior, it may here be mentioned that in England the practice was introduced by Henry II, of commuting the military services of his barons for money, and that these commutations, or at least some of them, were entered in his Books of Exchequer. When so commuted, any vassal's service, in case of a partial sale, admitted of easy division. But in Scotland, where no such commutation was ever heard of, an enactment that the purchaser of part of an estate should be charged with a just proportion of the services due by the seller, would, except in the case of lands held in *feufarm*, have been literally incomprehensible.

Mr. Erskine, who had unlimited faith in Skene's publication, has devoted an average section (II. vii. 8.) to the consideration of the statute attributed to Robert the Bruce; but all the practical information we obtain only amounts to this,

that he believed it genuine, yet could not tell whether it had ever been in observance.

It cannot be necessary to add another word in the way of discussion, as it must already be abundantly evident that the pretended statute is just a spurious copy of the genuine enactment of Edward I. But it may be asked how did that copy find its way into some of our old manuscript collections? Possibly the fact may be, that about the beginning of the 15th century it was transcribed, by a Scottish amateur collector of legal curiosities, into his scrap-book, or *omne gatherum*, with some studied alterations, to make it pass for what it is not, and found its way in the usual manner into later collections. The want of a date, were there nothing else suspicious about it, is strong presumptive evidence of its spuriousness; for, had it been the case that any king of Scotland had been induced to adopt Edward's statute, there could be no reason in the world why he should not specify the date of enactment as Edward had done. On the other hand, if the enactment attributed to Robert was nothing but a piece of imposition, the want of a date might be expected to add to the mystery, and diminish the chances of detection.

CHAPTER XI.

THE NOTARIAL INSTRUMENT OF SASINE.

THE formal instrument of sasine, already out of use in consequence of its statutory equivalent, is, or rather was strictly peculiar to Scotland. No such form was ever known in English practice; nor did our ancestors begin to use it till about the year 1430, according to Craig (II. vii. 2); or till the year 1404, if the instance cited in the Appendix to Erskine's Institutes be genuine. The question, which of these dates is nearest the truth, is of itself of little or no importance. But, when made aware of the great number and variety of facts and circumstances that can be brought to bear upon it, the question may be found to be more interesting, at least to an antiquary than he was prepared to expect.

In an early chapter (p. 4) I took occasion to notice the great importance imputed in very ancient times to peaceable personal occupancy; and have not the least doubt that before the invention of the Notarial Instrument of Sasine, the fact of being in the actual possession, in the character of proprietor, must have often been held practically to supersede the necessity of preserving written evidence of the manner how, and time when, such possession commenced,—and possibly the maxim—

"*Nulla sasina, nulla terra,*"

(without personal possession there can be no proprietorship), may have originated at a period much more remote than the first appearance of the instrument in question.

With regard to the proper date to be assigned for that event, Mr. Walter Ross, in his introductory discourse (p. 10),

states, that "this instrument was known in the practice of "Scotland long before the return of James I. Mr. Erskine, "in the appendix to his Institutes, has published an instance "of date twenty-two years (he should have said twenty-six "years) anterior to the time mentioned by Craig; and, when "we arrive at the subject, we shall be able to produce many "examples of a date still more early." But, did Mr. Ross redeem his pledge? did he produce even one example? He did not.

If the instance in Erskine's Appendix can be relied upon as genuine, or were a single genuine instance to be found of equal or nearly equal antiquity, there would be an end to the question; but then this other question would arise, had the learned Sir Thomas Craig no authority for his statement construed by Stair (II. iii. 16), as importing that our King James I brought with him from England the use of the Notarial Instrument of Sasine? And this again would suggest the inquiry—Is that a correct construction?

In examining these two passages of Craig's Work, II. ii. 18, and II. vii. 2, in which reference is made to King James, it should be remembered that the manner of giving sasine is one thing, and the Notarial Instrument another, and that some of the learned author's assertions apply to the one, and some to the other. If the author be occasionally chargeable with want of precision, so much the more should the reader be on his guard against misapprehension or misconstruction.

The first of the passages referred to commences with a qualification: "Creditur"—it is believed; but from what follows it is evident that the author's meaning was that at the time he was writing (1602) it was the general belief, in which he fully concurred, that James, whilst detained in England, had been assiduously observant of the laws and usages of that kingdom, and when he obtained his liberty brought with him to Scotland the Order of Chancery and the use of Sasines,—*usum sasinarum*. By *sasines* he could not mean Notarial Instruments of Sasine, but only the formalities of publicly inducting into possession, or giving symbolical delivery, for he

adds: *Sed adhuc sasinarum non erant Instrumenta.* "As "yet there were no Instruments of Sasine; for our forefa- "thers were in use to corroborate sasines *extra burgum* (that "is, except within royal burghs), by the seal only of the Sheriff "or official person giving them, and by such seal affixed to "the *Breve testatum*, to prove sasine given. Within burgh "they were content with the seal of the bailie (meaning "the magistrate) giving the sasine. But a later race, for "greater security to themselves, chose to have those sasines "reduced into the form of a Public Instrument."

The other passage seems equally well calculated to try the reader's skill in discriminating between specific affirmation and speculative opinion: "The solemnity of sasines, to which "we are now accustomed, did not come to us till the time of "James I, about the year 1430. Previously they were rare: "Nay, not many years before our time, the bailie's seal, espe- "cially in towns or cities, was set to the superior's investi- "ture, as the only requisite token of possession being deli- "vered. The occasion of the sasine being introduced arose "out of the ambiguity and frauds which occurred in the "delivery of possessions; when some thought that the supe- "rior, wherever he might be, could give possession by delivery "of staff or baton, others by delivery of keys; some only when "in his court, others when out of court before the *pares*. "Therefore, that no room might be left for doubt, and that "our ancestors might obviate the captious objections of idle "men, it was their will that there should be a real and actual "induction into the ground itself, and upon the very ground, "*ut vera possessio videatur.*"

After perusing the above versions, and the original passages if so inclined, the question may possibly occur to the reader, whether they contain an intelligible account of the origin of the Notarial Instrument of Sasine. So far is such from being the case, that one might easily be persuaded that the text of the original manuscript had here been corrupted, or very inaccurately copied for the press.

With regard to the office of Chancery, there is another

passage, II. 12. 26, in which Sir Thomas states explicitly, that the institution of Chancery was brought to us by James I, *ab institutis Anglorum*, and that till then we had no other mode of obtaining the renewal of a Feu than that prescribed by the Feudal Law, namely, that the vassal as a supplicant should go to the superior and obtain from him by entreaty a renovation of the investiture. Fortunately, however, we live in an age when authentic information regarding many points of ancient practice, both in England and in Scotland, can readily be obtained from sources unknown to Sir Thomas Craig or his contemporaries.

And First, regarding the practice in *England*, in remote ages, as to giving of seisin :—

(1.) Precept by William the Conqueror, directing seisin to be given of the Tithe of Rutland.

[*Between* 1066 *and* 1087.]

Willelmus Rex Angl. Hugoni de Portu, et omnibus fidelibus suis Francigenis et Anglicis, Salutem. Sciatis me dedisse Sancto Petro de Westmonasterio, Decimam de Rotelande; Et tu Hugo de Portu *inde eum saisias.—Form. Angl.* No. 492.

This precept seems to have been issued in reference to a previous Grant, which may have been made orally. The reader will of course understand that a Grant to the Patron-saint of the Abbey of Westminster was just a Grant in perpetuity to the Abbot and his successors. Perhaps Hugh of the Port was collector of the Tithe. That he gave seisin to the Abbot in person we cannot doubt, but in what manner we are left to conjecture.

(2.) Version of Precept of Seisin by Ralph the Bishop of Durham, in favor of the monks of Durham.

[*Circa* 1105.]

Ralph Bishop of Durham to Papedi Sheriff of Norham Greeting. Know ye that I have given to God and St. Mary, and to St. Cuthbert and his monks, Hallowstell, to be holden freely and quietly:

and I charge you that ye *sease* them therein quickly and without any contradiction: which if ye shall delay to do, then I charge that Ralph my nephew shall without delay *sease* St. Cuthbert and his monks therein, so that I may no more hear any clamour about it. Witnesses, Osbert the Sheriff, &c.—*Raine's North Durham*, No. 278.

(3.) Version of a Charter of Sale in the time of King Richard I, bearing that seisin had been given by the superior to the purchaser, by the same symbol by which the seller had resigned.

[*Between* 1189 *and* 1199.]

Kathewisia of Gurneio to all her men and friends, French and English, Greeting. Know ye that Alexander of Budicumba has sold all his land of Cliveware to Thomas the son of William, for 103 shillings, and has quitclaimed to him all his right, in presence of me and of my men within my court of Barowam; towit that land which Robert of Gurneio my father gave to him for his service; and the same Alexander divested himself thereof, and by a branch of a tree surrendered that land to me in my hand, for *seasing* the foresaid Thomas therein; and I have *seased* Thomas therein by the same branch; To be holden, with the five fardels of the land of Bacwella, to him and his heirs in capite of me and my heirs, by the same service which Alexander made to me, viz. the service of the fifth part of a knight. And the same Thomas thereupon became my liege man, and gave me a gold ring for acknowledgment. This covenant I grant and confirm by this my charter and the impression of my seal. Witnesses, &c.—*Form. Angl.* No. 100.

(4.) Version of the endorsement on the Charter of Feoffment noticed at page 125 hereof.

[14*th July* 1312.]

Memorandum—that on the day and in the year withinwritten, *full and peaceable seisin* of the acre within specified with the pertinents *was given and delivered*, by the withinnamed William of Sagenho to the withinnamed John of Salford—in their proper persons—according to the tenor and effect of the withinwritten charter; in presence of Niel of Salford, John of Seabrook, and others.

There is nothing said in this endorsement about the man-

ner in which seisin was given. We see, however, that the ceremony was managed without having recourse to the professional aid of any Notary Public; and, judging from other sources of information regarding the usual mode of giving seisin in England, we need not hesitate to assume that the parties went to the ground, and that the seller handed the purchaser a twig, or a bit of turf, or a morsel of earth, making use of some such words as these: "In presence of these wit-"nesses, I deliver this to you in token of seisin of the acre of "land specified in this Deed."

The seisin mentioned in the endorsement was, it will be seen, given *propriis manibus*, without any written warrant; and such must have been the original mode of giving seisin, before expediency gave rise to the custom of doing the same thing by deputy. The writing sometimes used for that purpose was not so imperative as our precept of sasine, but was just a power of attorney (in Latin of course) to this effect: "Be it known to all men by these presents, that I A. B. have "attorned and in my place put C. D. for placing E. F. in "full seisin of the lands of G. with the pertinents, contained "in the charter thereof granted by me in his favor."

In ancient times seisin was not given in England with every Deed of Feoffment; for if the land was unoccupied, and if the grantee could immediately enter into possession, it was seldom considered necessary to secure him by the legal equivalent of symbolical seisin. But in a later age, when seisin began to be considered an indispensable requisite, it became the usual practice to insert an attornment in every Deed of Feoffment.

(5.) Version of an attornment contained in a Feoffment or Deed of Bargain and Sale of six acres of land, &c. granted by Wm. Taylour husbandman, to Thos. Seymor knight, in the 34th year of the reign of King Henry VIII.

[24*th Jan.* 1542-3.]

And further, know ye that I have attorned, deputed, and in my

place put my Lovites Walter Tryte and John Lee my true and lawful attorneys and deputies, conjunctly and severally, for entering into the foresaid six acres, &c. and taking and receiving possession and seisin in my name and stead; and, after such possession and seisin so thereof taken and obtained, for delivering full, peaceful, and entire possession and seisin of and in all and sundry the premises, with all and sundry their pertinents, to the foresaid Thomas Seymor, or his attorney or attorneys in that part, according to the strength, form, and effect of this my present charter thereof granted to him: holding and to hold firm and stable all and whatever my said attorneys or either of them shall do in the premises. In testimony whereof, &c.—*Form. Angl.* No. 490.

The above-mentioned forms, viz. the Feoffment, the attornment, and the endorsement of seisin, are now almost entirely superseded by a totally different mode of transfering land, invented about the end of the reign of Henry VIII, and found to work with great facility, namely, the Lease and Release. By a Lease for a year, bearing to be granted for a pecuniary consideration, and at an elusory rent, the purchaser gets constructive possession, or forehand seisin; and by a Release (or relinquishment of all right to the land) granted in his favor next day, his *temporary right to possess* is instantly converted into a *permanent right of property*.

To the English practitioner of the present day, the Notarial Instrument of Seisin is altogether unknown, no such form as already mentioned having ever been made use of in English conveyancing. In ancient times, when seisin was given in England, and it used to be given not unfrequently, it was always given, and when attested was always attested, without the intervention of any Notary Public. It is an unquestionable fact, however, that Notarial Instruments, though never made use of in England in relation to the giving of seisin, were in those ancient times made use of in that kingdom on many other occasions.

SECONDLY, the practice in *Scotland* in ancient times regarding Sasine.

(1.) Version of an open Letter by John of Balliol, father of King John, to Gameline, Bishop of St. Andrews, regarding Sasine of a church or patronage.

[18*th June* 1268.]

John of Balliol, to the venerable father in Christ, Gameline Bishop of St. Andrews, Greeting and kind regard. Be it known to your paternity, that I regardful of the right of the Abbot and Convent of Dryburgh concerning the church of Lauder within your diocese, have for me and my spouse Dervorgilla and our heirs, resigned to them all right and claim which we had or could have to the patronage of that same church, so far as to us belongs: Wherefore, if you please, I entreat your paternity that you nowise molest or permit to be molested, regarding the said church, the said abbot and convent, whom I have cordially taken under my protection, *but that you grant them peaceful sasine of the said church:* In testimony whereof I send you these my letters-patent. Given at Bywell on the octave of the festival of St. Barnabas the apostle, in the year of Grace 1268.—*Liber de Dryburgh*, No. 9.

Two days afterwards the Bishop issues a Writ addressed to all the sons of holy mother church, setting forth that he had received Sir John of Balliol's letter—and being disposed to accede to his request, and also taking into consideration a decision pronounced by the Pope in favor of the abbot and convent, he confirms the said church to them, as a chapel of the mother church of Channelkirk—saving all episcopal and other dues which he and his predecessors were in use to receive:—and the Bishop's writ is afterwards confirmed by the Prior and convent of St. Andrews.

From the above we may see that in the time of King Alexander III, the Bishop of St. Andrews knew no better mode of giving sasine of the church of Lauder to the Monks of Dryburgh, than just to make it known to all concerned, that he approved of and confirmed the resignation that had been made in their favor.

(2.) Version of a Precept by Alexander of Balliol, directing his bailie and an associate to give sasine of the

property therein mentioned, to the said Abbot and Convent when required.

[22*d May* 1271.]

Alexander of Balliol, Lord of Cavers, to his beloved and faithful Robert of Edriston his bailie, and Walter Vallance, Greeting. I charge you that when required by the Abbot of Dryburgh, or the Prior or the Cellarer, ye give and cause be given sasine before the land of Lauder, to the said Abbot and Convent of Dryburgh, of Half the wood of Gladswood, for behoof of John of Wallace and Lady Hervorgill his spouse, conform to what is more fully contained in the charter which I have granted thereupon : at the doing whereof if you cannot both be present, the one of you who shall be thereto required by the other, shall nevertheless do it without delay : In testimony whereof I send you these my letters-patent. Given at Dryburgh, on the Friday next before Whit-Sunday, in the year of Grace 1271.—*Liber de Dryburgh*, No. 137.

(3.) Version of Precept of Sasine by Sir John of Graham in favor of the Abbot and Convent of Melrose, whereof the original is in Norman-French.

[28*th March* 1309.]

John of Graham to his loyal and faithful Adam Hughson and William Stub, his bailies of Wester Ker, Greeting. Whereas I have granted, for me and my heirs, to my good friends the Abbot and Convent of Melrose, the franchises of their lands of Eskdale in all points, therefore I command and charge that ye give sasine of these same franchises to the foresaid Abbot and Convent, and to the bearer of these letters in their name; and that ye cause my sergeants remove from their land, that none of them interfere with their liberties now or hereafter; and this you nowise omit as you value my favor. Given at Melrose, on the Friday next before Easter 1309.—*Liber de Melros*, No. 379.

From other Writs in said Liber de Melros, it appears that the lands of Eskdale in Dumfriesshire originally formed part of the Barony of Wester Ker—that Sir John's ancestors had bestowed these lands on the Monks of Melrose, under the reservation of certain seignorial rights and prerogatives—that

by his charter, No. 377, he not only re-bestowed the lands on Monks, but also conferred on them all he had right to in virtue of the reservation—and that the above precept was granted in reference to said charter. At that time Sir John was an adherent of King Edward II, who had just concluded a truce with King Robert the Bruce, within whose marches the lands and barony lay; so that neither he nor his bailies could give valid sasine without the consent of the Scottish King. By No. 378 (15 May 1309) he became bound to the Abbot and Convent in certain heavy penalties, in case of his failing or delaying to do as therein mentioned; and per No. 380, relating rather to the then practice in *England*, he on 31st July same year addressed a letter to King Robert to the following effect:—"To the noble and wise Prince the Lord "Robert by the Grace of God King of Scots, John of Graham, "Greeting Reverence and Honor. Sir, Whereas I have by "my charter given and granted to the religious men the "Abbot and Convent of Melrose, all the points and liberties "of the land of Eskdale, contained in their ancient charter, "which they had from my ancestors, the which points and "liberties were saved and reserved to me and my heirs, I "pray your Highness, that as the said lands are, by the truce "with you, within your bounds, you would permit any one "of my people to give sasine peaceably and without disturb-"ance to the foresaid Abbot and Convent of the liberties and "points aforesaid, more fully contained in the feoffment "which they have from you. Adieu, Dear Sir, may God "always guard your royal Highness. In testimony whereof "I have to this present letter set my seal. Given at Ber-"wick, the last day of July 1309."

It does not appear that Robert paid any attention to this letter. He might naturally think it would be better that the Monks of Melrose should be beholden to himself than to an adherent of the King of England. Per No. 381 it appears that eight years after the above date (by which time the Graham had probably returned to his allegiance), the King of Scotland took his own mode of gratifying the monks. On

16th September 1317 he caused a precept be addressed to the abbot of Arbroath, his chancellor, directing him to expede confirmation in their favor of the liberty of Eskdale, as contained in John of Graham's charter. Accordingly, that charter was duly confirmed in the large form on the Christmas-day of that year. By a clerical mistake, the confirmation bears date in the 11th instead of the 12th year of the king's reign. During the winter months of the 11th year Robert was in Ireland.

But it is chiefly with the above-mentioned precept of 28th March 1309 that we have here to do, regarding which it cannot be doubted that it was written by one of the monks of Melrose; and although it should be admitted that it was never acted upon, yet the terms of that document, and of Sir John's bond to the monks, and letter to the Bruce, leave no room to doubt that the nature of sasine was then as well known in Scotland as in England.

(4.) Version of Precept of Sasine by Wm. of Lamberton, Bishop of St. Andrews, in favor of the Abbot of Kelso, and Letter of delegation therewith connected.

[6*th July* 1317.]

William by Divine mercy Bishop of St. Andrews, to his lovite Michael Clerk, his steward within the bounds of Lothian, Greeting with Divine benediction. Whereas we have excambed with a religious man the Lord Abbot of Kelso, our church of Nenthorn with the fruits thereof, conform to a contract entered into between us and him, We issue our command, firmly charging you that ye cause to be delivered to him sasine of the said church with the fruits, conform to what you shall see in the said contract: and this ye nowise omit. Given at Monimail, on the Wednesday next before the festival of St. Margaret the Queen, in the year 1317.—*Reg. de Kelso*, No. 313.

[17*th July* 1317.]

[*Version of Letter of Delegation by the Land-Steward to the Baron-Bailie.*]—Michael Clerk, Steward of the lands of the Lord Bishop of St. Andrews, within the bounds of Lothian, To Henry

Stulp, bailie of Stow, Greeting and kind regard. Whereas I have received a mandate from my Lord the Bishop, for delivering sasine of the churches of Nenthorn and Little Newton, with their pertinents, to the Abbot of Kelso, or to his certain attorney, I command and charge you, on the part of my said Lord the Bishop, that ye give sasine to the said Abbot, or his certain attorney, of the foresaid churches with all their pertinents, as has been agreed upon between my said Lord the Bishop and the said Abbot; and this ye nowise omit. In testimony whereof I have caused to be made for you these my letters-patent sealed with my seal. Given at Pendriech on the Sunday next before the festival of St. Margaret the Virgin, in the year 1317.—*Idem*, No. 314.

(5.) Version of a Precept of Sasine in 1326, with an endorsement thereon.

To his beloved and faithful Hugh of Haydif, his bailie of Bemerside, John, laird of that town, Greeting in the Lord. Whereas I have granted and given to the religious men the abbot and convent of Melrose, two oxgates of land in my tenement of Bemerside, I hereby charge you that ye deliver to the attorneys of the said religious men, that same land which the late Hugh of Merton held of me within my foresaid tenement of Bemerside, and induct them into corporal possession. In testimony whereof I have set my seal to these presents.—*Liber de Melros*, No. 413.

Then follows a memorandum, written probably by an inmate of the Abbey on the back of the precept, importing that there were called as witnesses at receiving sasine, John, the son of Walter, Sheriff of Berwick, Roger of Almer, Sir Wm. Cambus, canon of Dryburgh, and many others, clergy and laity. This endorsement bears a date corresponding to Friday, 4th July 1326—a century probably before our ancestors began to use the Notarial Instrument of Sasine. The precept itself is not dated.

In relation to the next specimen of the ancient practice in Scotland regarding sasine, I beg to remind the reader of Sir Thomas Craig's belief that our king James I brought with him from England the *order of Chancery*, as well as the use

of sasines. I also beg to refer to the brief and inquest of the time of Alexander III, noticed in Chapter I.

(6.) Precept from the Chancery of the Steward of Scotland, afterwards King Robert II, proceeding on the retoured special service of Malcolm, the son of John of Carrick, and grandson of Niel of Carrick, as heir to his father.

[*6th April* 1359.]

Robertus Senescallus Scotiæ, Comes de Stratherne, ac Dominus Baroniæ de Lydgertwod, Nobili viro Will^mo^ de Gledstains militi, Ballivo suo Baroniæ prædictæ Salutem. Quia per inquisitionem de mandato nostro factam, et ad capellam nostram retornatam, compertum est, quod quondam Johannes filius Nigelli de Carrik pater Malcolmi filii Johannis de Carrik, latoris præsentium, obiit vestitus et saysitus ut de feodo, de omnibus terris de Whitslad cum pertinentiis infra Balliam prædictam; Et quod dictus Malcolmus est legitimus et propinquior hæres ejusdem quondam Johannis patris sui, de eisdem terris cum pertinentiis; Et quod est legitimæ ætatis; Et quod dictæ terræ cum pertinentiis de nobis tenentur in capite—Vobis præcipimus et mandamus quatinus saysinam hæreditariam prædictæ terræ cum pertinen. eidem Malcolmo vel suo actornato, latori præsentium, juste deliberari faciatis, salvo jure cujuslibet. Datum sub sigillo nostro apud Perth vi^to^ die Aprilis Millesimo ccc^mo^ quinquagesimo nono.—*Oldest extant Writ of Whiteslade in Berwickshire.*

The above being most precise and complete in all respects, it is impossible to doubt that at the above date Chancery forms had long been familiar to the notaries of Scotland. The Steward must then have had a well-regulated chancery of his own. Is it at all credible that the Crown had no proper chancery-forms, and no proper chancery-establishment till after King James I had returned to Scotland? The following statute will serve as an answer to that question.

(7.) Statute of the Parliament of King David II, passed on 7th October 1367, or at least between that date and 12th June 1368.

Statutum est per tres communitates in Parlemento præsenti,

quod cum quædam partes, &c.—*Scots Acts*, Vol. I. p. 145; *transcribed from an old manuscript volume in the Register House, known as* "THE BLAK BUIK," FOLIO 50.

[*Version.*]—Whereas certain parts of divers sheriffdoms of this kingdom have now long been and still are at the faith and peace of the King of England, in which parts there are divers lands held in capite of our Lord the King, of which lands the heirs within this kingdom are and always were at the faith and peace of our Lord the King, whensoever it was found by letters of inquest in form of Chancery, before the sheriffs of those sheriffdoms who had been appointed by our Lord the King, and retoured to Chancery as use is, that they were the true and lawful heirs of those same lands, &c. It is enacted by the three communities in the present Parliament, that he (the King) shall cause them get without delay letters of sasine in form of Chancery, directed to those sheriffs, who shall, *within the courts of their sheriffdoms* deliver to those heirs heritable sasine of those lands with the pertinents; which sasine there obtained shall be as available to them and their heirs as if they had obtained it upon the ground; neither shall the length of time during which their lands shall have been withheld or occupied by their adversaries, occasion them any harm or prejudice.

This statute, besides showing that the forms of Chancery were then in full observance, proves that sasine on the ground of the lands had by usage become an essential requisite; but it does not prove, as has been erroneously asserted, that sasine was then attended with the same symbols and ceremonies as in later ages. On the contrary, the fact that the Statute, whilst, in consideration of the emergency, it dispenses with being on the ground, does not also expressly dispense with customary symbols, fairly warrants the inference that in the time of David II, the delivery by hand of a modicum of the earth and stone of the very ground (which in the cases pointed at by the statute could not possibly be had) was not yet recognised as the usual or as an indispensable symbol. We may also rest assured that in Scotland, as well as in England, sasine in those ancient times was always managed without the intervention of any Notary Public.

(8.) Version of a Precept from the Chancery of King David II, issued on 24th October 1367.

David, by the Grace of God, King of Scots, to the Prior of Durham and his bailies of the Barony of Coldingham, Greeting. Whereas by an Inquest made at our command by our sheriff of Berwick and his bailies, retoured to our chapel, it appears that the late Patrick Rayll, father of Thomas Rayll, bearer of these presents, died infeft and seased as of fee, at our peace and faith, in two oxgates of land lying within the territory of Coldingham, and in the office of Head Sergeant within the barony of Coldingham, in the county of Berwick; and that the said Thomas is the nearest and lawful heir of the said late Patrick his father, in the same two oxgates of land and office, with the pertinents; and that he is of lawful age; and that he holds the foresaid two oxgates of land, and the foresaid office, with the pertinents, of us in capite: We command and charge you, that, when the said Thomas has performed to you for the said lands and office, with the pertinents, that which of right he is bound to do, ye without delay cause by your letters sasine of the said two oxgates of land and office with the pertinents, to be delivered to the said Thomas, or his certain attorney, bearer of these presents: Failing your doing so, we command that by your letters to our sheriff of Berwick and his bailies, they cause this to be done to the said Thomas justly and without delay. Witness ourself at Edinburgh, the 24th day of October, in the 38th year of our reign.—*Raine's North Durham*, No. 90.

The above is as perfect a chancery-precept as ever was issued, excepting that it does not contain the clause, "*Et capiendo securitatem*," usual in a later age. But here there was no occasion for that clause—the lands were held ward—the heir was of full age—he had left nothing unperformed of what he owed to the Crown—and there only then remained that he should satisfy any just claim of the Prior of Durham, within whose ecclesiastical jurisdiction the lands lay, and be then put into peaceable possession. But by whom or in what manner possession was given to him, we are left to conjecture.

(9.) Version of Precept of Sasine in 1380, by the then Marshal of Scotland, desiring his Bailie, after giving Sasine, to append his seal to the Precept.

[10*th April* 1380.]

William of Keith, Marshal of Scotland, to Philip of Dumbreck, his bailie constituted to that intent, Greeting. Whereas I have given to my Lovite Sir William of Calabre, canon of Aberdeen, and to the Cathedral Church of Aberdeen, an annualrent of six merks sterling, from my land of Achidonald with the pertinents, within my barony of Alden, in the Sheriffdom of Aberdeen, to be holden, &c. as my charter granted to him thereanent sets forth and testifies; I firmly charge and command you, that on sight hereof ye, without delay, cause due state and sasine of the foresaid six merks of annualrent to be given, upon the ground of the said land of Achidonald, to the foresaid Sir William and the foresaid church, or his certain deputy; and this ye omit not. In testimony of which state and sasine by you delivered, you can append patently your seal on the second tag near mine, to remain for ever with the foresaid Sir William and the foresaid church. Given at Kintore, the 10th day of April 1380.—*Reg. Episc. Aberd.* p. 127.

(10.) The Writ next to be noticed is or appears to be a Donation in feu-farm, of the Lands of Camieston, in the County of Roxburgh, granted by James Fraser of Frendraught in the County of Aberdeen, in favor of the Abbot and Convent of Melrose. It bears date 2d July 1402, and shows that though our ancestors were then unacquainted with the Instrument of Sasine, they practised more than one mode of giving sasine. Fraser held the lands ward of the Crown; and, for the welfare of his soul and the souls of his ancestors and successors, bestowed them to be holden of himself and his heirs, for yearly payment of £3 of the then currency, and at the same time to render to the king *servitium debitum et consuetum.* He, however, declared that the Abbot and Convent should be exempt from the feuduty payable to himself, should the lands be laid waste by war; but that their liability

should revive on the return of peace, or in case of a truce. The charter then contains a certificate to the following effect:

[2*d July* 1402.]

Of which land I have *by staff and baton* delivered sasine to their attorney personally (being all then possible to be done for their security), and by my Letters-Patent have caused deliver sasine to them (or granted warrant for delivering sasine to them), *upon the ground of the said land*, "*sub rati-habitione*," conform to the tenor of this my charter to them thereupon granted.—*Liber de Melros*, No. 504.

The sasine given to their attorney, *by staff and baton*, was very probably given *at Aberdeen*, where the charter was executed or sealed. The sasine directed to be given *upon the ground of the land*, lying within about four miles of Melrose Abbey, was granted *sub rati-habitione*—under approval or subject to ratification—(written by mistake in the Abbey-Register, *sub rati-habitatione*,)—that is, Fraser's charter was granted on the understanding that it, and the possession which the Abbot and Convent would readily obtain in virtue thereof, would be approved of or confirmed by his superior. In point of fact, his charter was (per No. 539) confirmed in ample form by King James I, on 10th May 1425—in which confirmation, however, no mention is made of any instrument of sasine in relation to Fraser's charter—which in all probability would have been the case, had the Abbot and Convent been in possession of any such instrument. We are not, however, entitled to infer from that circumstance alone (though the fact was so) that the notarial instrument of sasine had not yet made its appearance. So soon as the Abbot and Convent had actually attained the peaceable possession of the lands, no such instrument was necessary. Nothing more was requisite than that their right to possess should be confirmed by the Crown, as their proper superior. Till then their title was imperfect. Till acknowledged by King James as his vassals, they had no proper superior; because, being held responsible for the duties and

services exigible by the Crown, they were not Fraser's vassals, but the vassals of the Crown when received, and the £3 payable yearly to Fraser was not a feuduty at all, but a pecuniary burden, or encumbrance, resembling the interest of a loan. Accordingly it was so treated, per Nos. 589 to 592 of said volume, and ultimately resigned in the Abbot's hands *ad remanentiam*, many years after Fraser's decease.

The Writ No. IV of the appendix to Erskine's Institutes, purporting to be a notarial instrument of sasine of 16th November 1404, has occasioned me much perplexity. With regard to the Writ No. III, being a certificate nearly six years later, by a bailie appointed to give sasine that he had done so, evidence is still extant that many such certificates were granted, in different forms but to the same effect, from about that time till about half a century thereafter. This one is perhaps more grave and formal than the occasion seems to require; but in all other respects it has every appearance of authenticity. The notarial instrument of 1404 is however so peculiar in many respects, and contains so many pretensions to perfection, that it seems to challenge critical examination. The oldest instrument which I have seen, relating to *lands*, is not so ancient by thirty years. It will be laid before the reader by and by; but there is one earlier than this by nineteen years, in the Register of the Abbey of Scone, relating to *an annualrent*, which ought first to be noticed. Per No. 201 of that Register, Sir Robert Logan of Restalrig, for the welfare of his soul and the souls of his ancestors and successors, (at least so the charter bears,) gave and granted, in pure and perpetual almsgift, to the church of St. Michael of Scone, and to the abbot and canons there serving God, an annualrent of seven merks which he was accustomed to receive yearly from the lands of Malles (Mawes) within the barony of Restalrig, and known to be holden of him *in capite* as the overlord. At the same time, per No. 202, he gave and granted in the same manner the superiority of the said lands, together with the annualrent itself; and per No. 203 he

acknowledged receipt of £66 sterling from the abbot and convent as the price of the annualrent. All these writings bear date the same day, 14th September 1414; and in each of them it is stated that he gave his *bodily oath* in the chapter, before witnesses, that they should all be kept firm and stable. Moreover, it appears from the instrument of sasine, that on the said 14th September 1414, he granted a separate precept for giving sasine of the annualrent to the abbot on behalf of the church of Scone, and of the monks or canons dwelling there. Evidently much attention had been paid to the proper management of the business. The terms of the instrument of sasine may be seen from the following version:

[*4th May* 1415.]

In the name of God, Amen. Be it known to all who shall see or hear this present public instrument, that in the year from the Incarnation of our Lord 1415, in the Indiction the 8th, on the 4th day of May in the 21st year of the Pontificate of the Most holy Lord and Father in Christ, Lord Benedict XIII, by Divine providence Pope, in presence of me notary public and the witnesses underwritten, personally constituted a discreet man, William Chalmers Laird of Drumlochy, exhibited at the messuage-place of the lands of Mawes, a certain letter of Bailiary, made to him on parchment, by an illustrious man Sir Robert Logan knight, Laird of Restalrig, and sealed with the seal of the said Sir Robert, on red wax within white wax hanging thereto, which he caused to be read in vulgar speech by me the notary underwritten; whereof the tenor follows in these words:—Be it manifest to all by these presents, that I Robert Logan knight, Laird of Restalrig, have made constituted and ordained my beloved and special friend William Chalmers, Laird of Drumlochy, my bailie and special deputy, for giving sasine investiture and corporal possession to Alexander the Lord Abbot of Scone, or his procurator, in name of the church of St. Michael of Scone, and of the canons there serving God, of my annualrent of seven merks, which are due to me yearly from the lands of Mawes, of which lands I am the overlord: giving and granting to the same William my full power of giving the said sasine investiture and corporal possession, and of inducting as aforesaid the said abbot, or his procurator, in

name of the church of Scone, into the corporal possession as above set forth, and of doing all and sundry other things regarding the said sasine investiture and possession, which are known to belong to the office of a true bailie: holding and to hold firm and stable whatever my said bailie shall rightly and justly induce to be done in the premises. In testimony whereof my seal is set to these presents, at Scone the 14th day of September, in the year of our Lord 1414.—After the exhibition and reading of which letter, the said William Chalmers the bailie in that part of the said Sir Robert, by delivery of a silver coin (*per argenti traditionem*), at the messuage-place of the said lands of Mawes, in virtue and by authority of the foresaid letter of Bailiary, gave to the venerable Lord and Father in Christ, Lord Alexander by Divine permission, Abbot of Scone, in name of the church of St. Michael of Scone, and of the canons there serving God, heritable sasine investiture and corporal possession of seven merks of annualrent with the pertinents coming yearly from the foresaid lands of Mawes, according to the form and tenor of the charter of the said Sir Robert thereupon granted to the same Abbot and Convent; which charter at their request I there published and read word for word: And on all and sundry the premises the foresaid Lord Abbot, in name of his foresaid church and of the canons thereof, asked from me the notary public underwritten a public instrument to be made to him. These things were done at the messuage-place of the foresaid lands of Mawes, about the 10th hour before the mid-day repast, in the year, indiction, month, day, and pontificate foresaid: Present a venerable man, Mr. Alexander of Balbreny, Eustace of Rattray, &c. with many other witnesses specially called and required to the premises. —*Liber de Scon.* No. 205.

The above notarial instrument, as it relates to *an annualrent*, might naturally be expected to differ, as it does in many particulars from that exhibited by Mr. Erskine. The other instrument of a later date above alluded to, though relating purely *to lands*, differs from it still more considerably. Connected with the latter there is still extant, in perfect preservation all but the seals, a curious document in the *vernacular* of that age, which it would be wrong not to lay before the reader *verbatim et literatim*. It bears date four days before

the sasine was given, and is of the nature of an instrument of resignation ; not a notarial instrument, but a certificate under the seals of seven witnesses, all landed proprietors, that they had seen resignation made in the hands of the overlord, and had seen him confer the lands on the new vassal, and give him *real state* by the *symbol of a wand*, at the same time charging his baron-bailie to pass to the *soil* and cause the new vassal get *sasine possession and heritable state :*

[22*d July* 1434.]

Because that it is niedfull to bere wytness to Suthfastnes, We Wat of Tuedy of Drummelzere, Jamys of Tuedy son and apperand ayer to the said Wat, Patryk of the Lowys of Menor, John Dekyson of Wynkystoun, Georgs of Elphynstoun son and apperand ayer to John of Elphynstoun of Henrystoun, Thomas of the Louch burgess of Peblis, and Wilzame Bychat of Eschellys, war present herd and saw, and for wytnes war tane, wyth mony others, in the chapale of Our Lady Sant Mary, the qwylk John of Geddes, Lord of half Ladyhurd, gert be byggyt within the parych kyrk of Sant Androw of Peblis, qware the said John of Geddes, Lord of Half Ladyhurd, wyth the pertinence lyand in the barony of Kyrkhurd wythin the Schyrradume of Peblis, nowthyr led be strenth na aw, na zyt sledyn throuch errour, bot on his awn fre wyl, made puire and sympill resignacyon of the forsaid half of Ladyhurd wyth the pertinence, wyth staffe and bastoun, wythoutyn ony condycioun or agayn haldyng, in the hands of a wurchepful man, Wat Scot Lord of Morthouystoun, and Oure-lord to the said John of Geddes, of the forsaid half of Ladyhurd wyth the pertinence, and al ryth and claym the qwylk the forsaid John of Geddes in the forsaid lands wyth the pertynence had or myth have, be ony manr of way, fra hym and his ayerys, to the said Wat Scot his Oure-lord he gave up and qwytclaymyt for everr mare : And than the forsaid Wat Scot, in presens of us before wrytyn and mony oyr gave al tha forsaid lands of the half of Ladyhurd, wyt the pertynence tyl a noneste man Wilzame of Geddes, and wyth a wand the qwylk the said Wat Scot had in his hands he gave to the said Wilzame of Geddes state ryalle of the said lands wyth the pertinence, scharchand (charging) a worthi man Patryk of the Lowys of Menr balzhe to the said Wat Scot of al his lands wythin the barony of Kyrkhurd forsaid, to pass

to the sulzhe, and ger the said Wilzame of Geddes have sessyng possessyoun and heritabil state of al the forsaid lands of the half of Ladyhurd with the pertynence. In wytnes of al the forsaid thyngs We the forsaid Wat, Jamys, Patrik, John, Georg^{s}, Thomas, and Wilzame, has put to oure selys to this present wryt of wytnessyng —at Peblis the tua and tuendy day of the moneth of July the zhere of Oure lord a thousand four hunder thretty and four zherys. —[*From the Castle-Craig Charter-chest.*]

The Baron-bailie of Sir Walter Scot the Overlord, did not himself give the sasine. He bade the sergeant of the barony do so, who, along with the bailie and many others as witnesses, accompanied the new vassal to the door of one of the houses on the ground, and introduced or inducted him into the possession, just as he might have inducted a new lessee,—all as appears from the following notarial instrument, in which there is no mention of earth and stone, or of any other symbol:

[26*th July* 1434.]

In Dei nomine Amen. Per hoc præsens publicum instrumentum cunctis pateat evidenter, quod anno ab incarnatione Domini Millesimo quadringentesimo tricesimo quarto, mensis vero Julii die vicesimo sexto, Indictione duodecima, pontificatus sanctissimi in Christo patris ac Domini nostri Domini Eugenii divina providentia Papæ quarti anno quarto, In mei Notarii publici ac testium subscriptorum præsentia personaliter constitutus honestus vir Johannes Yong serjandus baroniæ de Kyrkhurd ex præcepto et mandato speciali probi viri Patricii de Lowis de Men^{r} ballivi honorabilis domini Walteri Scot domini de Morthouystoun et baroniæ de Kyrkhurd infra vicecomitatum de Peblis, prout per quandam literam patentem et sigillo dicti Walteri sigillatam, ac per me Notarium publicum subscriptum coram testibus infrascriptis perlectam manifeste apparuit, dedit, honesto viro Wilelmo de Geddes saisinam dimidiæ partis de Ladyhurd cum pertinentiis in dicta baronia de Kyrkhurd et infra dictum vicecomitatum de Peblis, ac eundem Will^{m} in statum et possessionem hæreditariam ejusdem dimidiæ partis cum pertinentiis præfatus Johannes Serjandus protinus introduxit. Super quibus omnibus et singulis idem Wilelmus a me Notario publico infrascripto sibi fieri petiit unum publicum instrumentum. Acta fuerunt hæc apud

Ladyhurd, ad ostium cujusdam domus ibidem situatæ, hora quasi novena ante meridiem, anno die mense indictione et pontificatu supradictis, præsentibus ibidem probis et honestis viris Waltero de Tuedy de Drummelzere, Will^mo de Tuedy filio ejusdem Walteri, Patricio de Lowis et Henrico Patricii de Mener, Johanne le Wach de Ladyhurd, Roberto de Balkasky, et Simone de Denum de Scottystoun, Domino Thoma de Woode, perpetuo vicario de Kyrkhurd, et Jacobo de Tuedy, cum multis aliis testibus ad præmissa vocatis specialiter et rogatis.—[*From the same Charter-chest.*]

In the above writs, the resignation, the new grant, and the sasine, are narrated as affairs of importance, and I submit that we are entitled to hold that the giving of sasine by the symbols of earth and stone, had not yet become an established usage, otherwise the sergeant would have made use of these symbols, and the notary, as was afterwards the invariable practice, would have duly recorded the fact. But in the Instrument of 16th November 1404, it is stated that the bailie delivered heritable state possession and sasine with earth and stone, *as use is*,—and there are so many other suspicious circumstances about that instrument, that it is not easy to regard it as genuine.

(1.) It bears that the sasine was given to an attorney, constituted by a writ under the quarter-seal. Such writs, invented after the experience of ages, as a protection against dishonest practices, were not uncommon in the time of King James V and Queen Mary, but must have been unknown in Scottish practice at the date assigned—and why one could have been considered requisite on that occasion does not seem clear, nor how it could have been obtained after the date of the warrant of sasine (Perth, 12th November), in time for exhibition at a considerable distance in the country, on the morning of Sunday the 16th, a little after sunrise.

(2.) The warrant directs the bailie to take security for the duplication of the superior's blench duty of one

penny. Such direction in a Crown precept, after the institution of the Respondé-Book, might have been highly proper, as marking the limit of the sheriff's responsibility; but, that Lord Saltoun, the son-in-law of the then Duke of Albany, would desire his bailie to take security for the penny of entry-money surpasses belief.

(3.) The instrument bears that the bailie exacted a sasine-ox for his own trouble, a perquisite never exacted except by a sheriff at giving sasine on a Crown precept to the heir of a Crown vassal, and never mentioned in his instrument of sasine.

(4.) To give the greater appearance of truth to this part of the instrument, its concocter has given a special description of the sasine-ox exacted. It was it seems of a black or dun colour, with white streaks or spots—such verily as in vulgar speech would have been termed a *dun-gairy!*

(5.) He had previously given a description of the seal appended to the warrant—the impression on red wax of a certain shield containing a certain lion with a bend—a more homely description indeed than that given in books of heraldry, though sufficient to identify the escutcheon of the family-name, Abernethy; but for what purpose, other than deception, inserted in this instrument it would be impossible to tell.

It may be true, indeed it is not unlikely, that some years previously a charter of the lands of Kinalty had been granted under the seal of Lord Saltoun, in favor of John Abernethy, and that he had died in possession; but that Lord Saltoun ever granted any such precept in favor of his heir, as that described in the instrument, is not so easy of belief. But perhaps it will be thought that I have already said more than enough on that subject.

Adverting once more to the proper subject of this chapter, I think I have thrown some light on the ancient practice

regarding sasine in general; yet, in all my researches I have nowhere discovered the least particle of evidence to entitle us to impute to James I any share of the merit or demerit of devising the Notarial Instrument of Sasine, or of bringing it into use. In short, what more likely than that it originated in pure accident? It was not a new invention, but just the application of an old invention to a new purpose. The Notarial Instrument had long been made use of in practice for various purposes, and what more natural than to try whether it would serve as legal evidence that sasine or possession had been given, or that constructive delivery had been made? At once it was found to answer the purpose exceedingly well; yet it did not soon become a matter of ordinary practice, at least the number of such instruments increased but slowly till towards the end of the 15th century. But, when it had become a matter of ordinary practice, so much regard was paid to it that it rapidly acquired an undue importance. Peaceable personal possession for ever so long a term of years, if without writing, was reckoned of no avail. The maxim—

Nulla sasina nulla terra,

received a new interpretation, and was held to signify that a Notarial Instrument was an indispensable requisite. A race of false notaries gradually sprung up like noxious weeds, in the most civilized districts of Scotland, whose Instruments of Sasine in whose favor soever, if *ex facie* formal and regular, were received as *probatio probata* of ownership, excluding all evidence to the contrary, except equally formal written evidence of an earlier date; and all this, be it remembered, many years before the institution of the sasine records. The consequence was, that the Notarial Instrument of Sasine became the fertile source of many a cruel fraud.

CHAPTER XII.

ORIGIN OF THE FORM OF ALIENATION TO BE HOLDEN A ME VEL DE ME.

This form, otherwise termed with questionable accuracy *two manners of holding*, was not introduced till after the year 1540. Before that period the form of alienation long practised by our ancestors was that the seller either resigned in the hands of the superior, in order that the purchaser might obtain a purely new investiture; or, where such investiture might not be expected to be readily obtained, one charter of alienation, and only one, was granted by the seller himself, containing the *Tenendas a se de superiore suo*, already explained, doubtless expected by the purchaser to be confirmed by the seller's superior within a reasonable time. At the period referred to a new and singular practice arose of two charters being granted by the seller, the one containing a Tenendas *de se Blench*, and the other the previously usual Tenendas *a se de superiore suo*. The purpose of this device was to obviate the difficulties of obtaining a safe investiture, supposed to have arisen in consequence of a remarkable statute of the Scottish Parliament, commonly cited as 1540 chapter 105, or to secure the advantages supposed to be thereby left open to the vigilant *bona fide* purchaser. The nature and effect of the complicated forms then devised cannot be well understood without knowing something of the circumstances which led to the passing of that statute.

Before entering on the recital of those circumstances, it may be proper to notice certain other Scottish statutes,

some of them older than that above referred to. By one passed in the 22d year of the reign of James II, commonly cited as 1457 chapter 71, Crown vassals were permitted to grant Feu-rights of their Ward-lands, or to change the rights of their Ward-vassals into Feu-rights, the king being invited to set the example. But apparently little practical good was the result. The statute was little respected. Down probably to that date, almost all the lands in Scotland were still held ward, and yet at a much earlier period our ancestors must have been well acquainted with the nature of Feufarm-holding. From the words of the statute itself, it appears that if, before it was adopted, a Crown vassal holding ward had made any grant in feu-farm, such grant fell in ward to the Crown at the Crown vassal's death, in case of his leaving a minor heir. These are its terms:—

Item, anents feuferme, the lords thinks speidfull that the king begyne and gif exempill to the laif—and what prelate barone or frehaldar that can accorde with his tenande apone setting of feuferme of his awin lande, in all or in part, our soverane lorde sall ratify and apprief the said assedation; so that gif the tenandry happynnis to be in warde in the kingis hands, the said tenande sall remane with his feuferme unremovyt, payande to the king siklik ferme endurande the warde as he dide to the lorde, so that it be set to a competent avail, without prejudice to the king.—Vol. II p. 49, No. 15.

It is evident that any benefit to be derived from that statute depended entirely on the king's goodwill, and if he did not begin and set a good example, it was not to be expected that he would readily ratify and approve the feu-farm rights some of his own ward-vassals were willing to grant. The statute was little regarded by his immediate successor James III, for we find that on 10th July 1476, he within his own *quadriennium utile*, having attained majority in 1473, revoked in Parliament not only all his own Blench-farm donations of Ward-lands, but also all alienations, donations, and grants made by him in feu-farm.—Vol. II p. 113.

In the 16th year of the reign of James IV an attempt was again made to legalize grants in feu-farm. By one of the statutes of 19th March 1503-4 it was ordained that it should be lawful to him to set all his proper lands, both annexed and unannexed, in feu-farm to any person or persons, on such conditions as he should think expedient, but yet so as not to be in diminution of his rental, gressums, or other duties. It appears, however, that this statute, so far at least as related to lands previously annexed to the Crown, was intended as a personal favor to the king; for though according to it all the feu-rights to be granted by him should stand perpetually, yet after his decease the lands which had been annexed should return to their original nature, "sua that his "successors sall not have power to analie nor set in few, mair "than they had befoir the making of this statute." In return for this indulgence, the king granted to all his vassals without exception, that every lord, baron, and freeholder, spiritual and temporal, should have power during his majesty's lifetime to set all their lands in feu-farm to any person or persons, "sa that it be not in diminution of their rentale"—and such alienations, though they should extend to the *most part* of all their lands, should be no cause of forfeiture to granter or receiver.—Vol. II p. 253, No. 36 and 37.

The above-mentioned indulgence was extended to James V by his Parliament, in the 28th of his reign, with this difference that the feu-rights to be granted by him should be not merely not in diminution, but actually in augmentation of his rental—(Vol II p. 376, No. 35.) And as nothing was said about Crown vassals, it may fairly be inferred, that they did not consider it necessary to obtain a new acknowledgment of their right to improve, if they thought proper, the condition of their ward-vassals. Possibly they had made some grants in feu-farm which, but for the above enactments, would never have been made; but a rude age is not favorable to the introduction or spread of generous or liberal principles, and sinister influences had long been at work to the great discredit of the law and practice of the country.

As already hinted, the practice of our ancestors regarding alienations, had, for a long period prior to 1540, been remarkably steady and uniform. Sasine on the superior's new grant, where a new grant was obtained in consequence of the seller's resignation, or sasine on the seller's single alienation-charter, when confirmed by the seller's superior, made all right, if there existed no mid-impediment. But proprietors occasionally made grants or alienations to be held *de se*, and when a charter with such *tenendas* was followed by sasine, the title was complete in point of form without confirmation. The Notarial Instrument, anciently employed, as already observed, for many practical purposes, was, when it came to be used as evidence of the delivery of sasine, regarded as a useful instrument and a valuable. But it was useful and valuable so long only as the office of notary continued to be exercised with probity. A Notary Public, in ancient times, when few of the laity could write, was a clerical penman qualified to frame and engross Contracts, Bonds, and other Deeds, and licensed by high authority to give his attendance in person on any lawful occasion, to draw up a formal narrative of any event or transaction that should take place in his presence, if requested so to do by any party having interest. In support or in proof of the verity of such narrative, the notary was accustomed to insert the names of the bystanders, or (when very numerous) of a moderate number of them, in the order always of each individual's rank or station in society; but, till comparatively modern times, it seems to have never been considered requisite that he should describe any of the witnesses by their place of abode, or proper designation, and the notary himself was the only individual by whom the instrument was attested. Whilst the office was exercised by few, and these not merely nominally but really of the clerical order, a Notarial Instrument received in society the like credence as we are now-a-days accustomed to attach to an official certificate of the Lord Mayor of London, or Lord Provost of Edinburgh. Those who first exercised the office in Scotland, were appointed by the Pope or the Roman Emperor.

The Pope's Notaries, who had authority to act in ecclesiastical matters as well as civil, designed themselves Notaries Public by *apostolical* authority; the others, whose license was limited to civil matters, styled themselves Notaries by *Imperial* authority. One of the Scottish statutes, of 27th November 1469 (Vol. ii. p. 95, No. 6), bears that *it was thought expedient* that the King (James III), as having full imperial jurisdiction within his realm, should appoint Notaries, whose instruments should have full faith in all civil contracts; but before exercising the office they were to be examined before the Bishop within whose diocese they resided, and to be certified by him to be of good fame and sufficiently qualified. By the same statute it was provided, that in time to come no Notaries made or to be made by the Emperor's authority, should have faith even in civil contracts, unless examined by the Ordinary (the Bishop's Official) and approved by the King's highness, "and that ful "faith be gevin to the Papale Notaris in tymes bygane and "to cum, in *all thare* instrumentis;" and also that full faith be given to all instruments previously made by Imperial Notaries, "like as thai ar of vail," that is, so far as they ought to be available, but no farther. Which of these three kinds of *Notars*, apostolical, imperial, and regal, first began to lend themselves to dishonest practices, we cannot tell; but we may learn from the Statute-Book, that Scotland was long infested with a swarm of worthless characters, practising as notaries, among whom there doubtless were not a few who had assumed and were exercising the office without any authority whatever.

Among the acts proposed and adopted, 19th March 1503-4, there is one (Vol. ii .p. 250, No. 8), which expressly bears that many of the lieges had complained to the King that there were so many *false Notars* within the realm addicted to fraudulent practices, that no loyal layman was secure of his heritage, and no beneficed man of his living; and it was ordained that the Bishops and their Officials should, time and place convenient, call before them all the *Notars* within their diocese, and cause them be examined "upoun thair suffi-

" cience and knawledge, and als tak inquisitioun how thai " have demanit thame, and of thair fame—and the personis " that thai fiud culpable that thai deprive thame of thair " offices, and punyss thame for thair faltis according to thair " demeritis—and the personis that thai find acceptable, that " thai send thame with thair writtingis to the King's hienes, " quhilk sall depute certane personis to examyn thame, and " gif thai be ganand to mak thame regale gif thai be not maid " regale of befoir. And als that the said ordinaris tak inqui- " sitioun of all thame that usis fals instrumentis—and insafer " as belangis his office ordinar, to punyss thame, and quhair it " belangis not to his office ordinar, to send thame to the king " to be punyst as effeirs." This was in the time of King James IV. Various other statutes for the punishment of false notaries, and of the users of false instruments, were passed during the reigns of James V and Queen Mary—many of the threatened punishments being sufficiently severe,—such as " pro- " scription, banishment, and dismembering of hand or tongue," but all to little or no purpose—simply because the Notarial Instrument of Sasine then in use, towit the bare unsupported attestation of a single individual, calling himself a Notary Public, was received as evidence, though better fitted to conceal fraud than to prevent it. Its very solemnity was a snare. It might be antedated—its whole narrative might be fictitious. Even the Notary may have been an ideal personage. No matter, the Instrument was probative, if sufficiently formal. Whilst such facilities for committing fraud were allowed to exist, it was useless to attempt to suppress it by punishing the guilty, or rather by threatening to do so—an empty threat, so long as detection was all but impossible.

Among other consequences of this state of matters, there arose a daring species of fraud in alienation, the manner of which may be thus described: Proprietors of lands made private sales, real or pretended, to their relations or to confederates, granting them charters with precepts of sasine to be holden *de se*. On these the grantees readily obtained Notarial Instruments of Sasine in all due formality, the granters all the

while retaining the natural possession. They afterwards sold and conveyed the lands to other parties, by alienation-charters to be holden *a se*, and on receiving the price pretended to cede the natural possession—when the parties who had previously obtained *private* sasine made their appearance, and if their written titles bore the semblance of regularity in the then requisite legal formalities, they were in strict conformity with the law as then administered, preferred to *bona fide* purchasers or *bona fide* creditors. The following enactment of the Scottish Parliament, devised for the purpose of putting a stop to such fraudulent practices, was attended with consequences probably never contemplated :—

[14*th March* 1540-41.]

Item for eschewing of inconvenientis that oft and divers tymes happinis in this realme, of the new inventit craft and falsett committit and done dalie, be thame that sellis thare landis, or disponis the samin *ex titulo oneroso*, that puttis thair barnis or uther frennd and persone in stait of the samin before the dait of the selling or geving thairof to utheris as said is, Herefore it is statute and ordanit that quha sellis and disponis ony landis or annuell rentis to ony maner of persoun for ony caus quhair warrandice may fall, and puttis utheris in private stait thairof, not be resignatioun in the Kingis graces handis, nor be confirmatioun with precept past furth of the chancelarie, nor be plane resignatioun in the ouer-lordis handis, or confirmatioun of the ouer-lord; and the persoun that happynis to gett the landis, and broukis the samin peceablie zeir and day, be labouring manuring and uptaking of the malis proffittis and dewiteis, and sa kennyt heretable possessor thairof zeir and day, the persoun or personis havand privait stait and saising of the saidis landis sall never be heard to clame the samin aganis the secund heretable possessor for ony caus, bot to persew his interess aganis the principale gevar and his airis; and the persoun sellar or gevar to be callit and declarit infayme at the Kingis graces instance, and to be punist in his persoun and gudis at the kingis grace will and plesor; And gif the ouer-lordis ressavis dowble resignationis wittandlie to the effect abone writtin, thai to be punist sielik; And this act to be extendit to thame that makis dowble assedationis and dowble assignationis.—*Acts of the Parliaments of Scotland*, Vol. ii. p 375. No. 23.

I shall not attempt to give a readable version of the whole of the above confused and rugged composition; but, if I mistake not, the enacting words may be thus translated:—

It is ordained, that if any person shall sell his lands or annual-rents, or dispone the same for any cause inferring warrandice, after giving sasine thereof to another party privately, or in any other manner than by open resignation in the hands of his Majesty, or other immediate lawful superior, or by charter and sasine duly and openly confirmed by the proper superior,—and if the party to whom the public sale or onerous alienation is made shall happen to get peaceable possession, and to enjoy the same for year and day,—and be known to have been in possession for that period in the character of proprietor, from such overt acts as cultivating the ground, and reaping the fruits, or uplifting the rents,—then the person or persons who previously obtained private sasine shall never be permitted to challenge the right of the second heritable possessor, on any ground whatever; without prejudice, however, to his or their right of recourse against the principal party giver of the private sasine and his heirs; and such party shall be cited at his Majesty's instance, and be declared infamous, &c.

No Statute ever adopted by any Scottish Parliament, had a more powerful or more lasting effect on the forms of alienation peculiar to this country. It gave rise to the distinction between Base Investiture and Public Investiture, to the obligation to infeft *a me vel de me*, and to a set of cumbersome forms long adhered to as matters of ordinary practice, till gradually absorbed and superseded by the Disposition. But the principles then established have undergone no change, with this single exception, that the advantage then adjudged to peaceable personal occupancy for year and day, has been long since neutralized by the Scottish Statute of 1693, chap. 13, establishing the preferable virtue of priority of registration in the Sasine-Record.

Looking to the above quoted more ancient Statute, the cautious and observant man of business, when employed for a purchaser, could not fail to perceive that besides the plain straightforward mode of obtaining a perfect title, by resignation

in the hands of the seller's immediate superior, his client's security, should such superior not be instantly prepared to grant him a Resignation-charter, might expeditiously be ensured, as far as possible, by other modes:

Viz. Either by sasine *de plano* on a charter and precept to be granted by the seller, with a Tenendas *de se,* if followed up by personal occupancy, or overt acts of ownership, before any other party should attain possession;

Or, by sasine so given, on a charter and precept by the seller, containing a Tenendas *a se de superiore suo,* if openly confirmed by the seller's superior before the intervention of any mid-impediment.

He would likewise perceive that by the Statute no latent sasine would be available against any party validly *seased,* and actually and openly in possession as proprietor for year and day unchallenged.

To secure to the purchaser all possible advantages, the following writings were devised:—

(1.) A contract of alienation between seller and purchaser, usually executed in *duplicate,* setting forth, in the spoken language of the period, the terms of the bargain, and the obligations mutually incumbent on the parties; especially an obligation on the seller to this effect: that he would with all convenient speed duly and validly infeft and sease the purchaser *titulo oneroso,* by two separate Charters and manners of holding, one thereof to be holden *of* the seller in free Blench, and the other *from* the seller (or away from the seller) of and under his immediate superior, in the same manner as held by the seller himself—the title, as holding under the seller's superior, to be perfected either by a resignation-investiture, or a confirmation-investiture,—or by both should such be the purchaser's desire, the one to be nowise incompatible with or prejudicial to the other. The contract sometimes also contained an obligation of warrandice, and an assignation to rents, &c. The purchaser, on the other hand, became bound for the price according to bargain, and to

relieve the seller in time to come of all obligations incumbent on him to the superior. In the duplicate retained by the purchaser (the only one to be found among the title-deeds), his counter-obligations were often omitted or greatly curtailed, so that an inexperienced person who may take a fancy to examine a very old progress, may be apt to conclude that the writ styled a contract of alienation is not a contract at all, but a unilateral deed.

(2.) A formal charter of alienation in Latin (then and long afterwards held to be the only proper language for charter and sasine), granted by the seller to the purchaser, as soon after the execution of the contract as possible, and bearing to be granted in implement thereof; containing a Tenendas *de se* Blench, with a precept subjoined, authorizing immediate sasine to be given.

(3.) Another Charter of Alienation in the same language, and of the same date, also bearing to be granted in implement of the contract; containing a Tenendas *a se* and a precept of sasine, corresponding verbatim et literatim with that in the *de se* charter.

(4.) Besides these two charters, the purchaser's agent usually exacted a procuratory of resignation, to be acted upon if found agreeable and convenient to the superior. At a later period it seems to have been considered an improvement to insert the procuratory in the contract as a matter of course.

(5.) Sasine on the Alienation-charters,—one Notarial Instrument by avoiding all notice of the *modus tenendi* being made to suffice for both. Here due regard was paid to consistency. If by giving sasine it be understood that the party is put into the actual possession, it is obvious that till he has quitted or been deprived of what he has thereby obtained, it cannot be bestowed a second time. It was therefore not without design that the precept in each charter was exactly the same. Before confirmation the sasine was regarded as having followed on the *de se* charter; and as that charter was superseded by the confimation, it was *then* held to have followed on the *a se* charter.

And (6.) Charter of Confirmation by the seller's superior, of the purchaser's subordinate title—the *a se* charter and the sasine as therewith connected. This, if no mid-impediment appeared, drew back to the date of the Notarial Instrument. Meantime, till such confirmation was obtained, which occasionally was not till after the lapse of some time, the sasine as attributed to the seller's *de se* charter, if followed by continuous peaceable personal occupancy, or overt acts of ownership, secured at all events the *dominium utile;* and, if no mid-impediment had occurred, the said *confirmation* reached the *dominium utile*, and the seller's *de se* charter was then thereby entirely superseded.

The reader is not to understand that every purchase of lands was managed in the manner above explained ; for, occasionally, where the superior was ready instantly to receive the purchaser, only one alienation-charter was exacted from the seller, namely, that with the Tenendas *a se de superiore suo ;* or perhaps both alienation-charters were dispensed with, and the purchaser was entered at once with the superior by charter of resignation proceeding on the seller's procuratory.

But the system under examination, the Tenendas *a me vel de me*, will be best understood by confining our view to the two alienation-charters, the one Instrument of Sasine, and the one Charter of Confirmation. During the interval between the date of the sasine and the date of the confirmation, the sasine could only be available as connected with the *de me* charter; because the investiture thereby constituted, though only intended to serve a temporary purpose, was complete in itself as having a superior (the seller), a vassal (the purchaser), and a distinct *modus tenendi.* The same sasine, so far as depended on the *a me* charter, could be of no avail whatever till confirmed ; because till then it had no superior. But the confirmation when obtained drew back to the date of the sasine. The seller's superior thereby adopted it and its warrant, as if originally given and granted by himself—specifying at the same time the proper *modus tenendi.* As a necessary consequence of such confirmation taking effect

the connexion of the sasine with the seller's *de me* charter was dissolved, and the subordinate temporary investiture held of the seller thereby annulled or superseded—provided always that no mid-impediment (such as a mid-superiority) had in the meantime been created by the misconduct of the seller, or by any lawful step taken by any creditor of the seller, preventing the confirmation from having such effect. On the other hand, the creation of a mid-impediment, or mid-superiority, had not necessarily the effect of annulling the base investiture obtained by the purchaser. He was still entitled to abide by the seller's *de me* charter, and the Notarial Instrument of Sasine as therewith connected; and if he had actually attained peaceable personal occupancy, no other party appearing with a preferable title, he was effectually secured permanently in the *dominium utile*.

The late worthy Mr. Walter Ross entertained some very vague and erroneous notions regarding these matters. In particular, he imagined that the two alienation-charters were always followed by two notarial instruments of sasine—that the sasine on the *de me* charter was first expede—and, after the lapse of some time (how long he does not venture to tell), sasine on the *a me* charter—and that the second sasine had the effect of neutralizing the first, but how or to what extent he has not clearly explained. Witness the following bewildering passage:—

> The first and most expeditious step was to take infeftment upon the precept in the charter *de me*. This so far denuded the granter of the *dominium utile*, but did not secure the purchaser against posterior public rights. He therefore hastened to enter into the natural possession, or brought an action of maills and duties against the tenants, which completely vested the property in him. But still the holding was base; the property had still two superiors; and therefore, to get clear of the interjected one, the purchaser next took infeftment upon the precept in the charter *a me*.—*Ross's Lectures*, Vol. ii. p. 266.

Strange that the purchaser had *two superiors* when infeft

on *one only* of the alienation-charters, and *only one superior* when infeft on *both!* The system has never been rightly explained. Mr. Ross could not rightly explain what he did not rightly understand. He erroneously imagined there were two separate acts of giving sasine, and two notarial instruments, the one applicable to the *de me* charter, and the other to the *a me* charter; and he vainly attempted to explain how matters stood in the interval between the first sasine and the second, and in the other interval between the second sasine and the confirmation. He supposed that by the sasine on the *de me* charter the seller became an interjected superior, without encroaching in the smallest respect on the right of the proper superior—that by the sasine on the *a me* charter a step in advance was made towards divesting the seller of said interjected superiority—and that the operation thus begun was completed by the true superior's confirmation of the *a me* investiture. In his observations on the effect of the confirmation-charter he begins to speak intelligibly enough; but his theory of two superiorities, an interjected superiority and a true superiority, is sheer nonsense. If *dominium utile* be holden of an interjected superior, it cannot at the same time be holden of any other superior. The same fee cannot be holden of two different superiors at one and the same time. In sales by the double charters this maxim was kept up in all its integrity. After sasine and before confirmation, the seller, in respect of the *de me* charter, and of the sasine as therewith connected, was the purchaser's temporary superior, but at the same time his only superior. But this temporary superiority terminated so soon as the seller's superior received the purchaser as his vassal. It always was an inherent condition of alienation by double charters, that so soon as the seller's superior should confirm the *a me* investiture, the seller's connexion with the lands should entirely cease. And with regard to the single notarial instrument, is it not the fact that before sasine was given to the purchaser, the seller was in possession, and that by the sasine he was understood to cede the possession to the purchaser? This he could only

do *once*, unless matters were restored to their first position. The seller could not give a valid *second* sasine whilst the *first* remained effectual. He had therefore no choice but to give sasine on both charters at once. In old progresses the two charters may still be frequently found together, along with the single notarial instrument—never two instruments —unless indeed where duplicates may have been thought expedient, as in the case of a sale of two estates by one contract. Had two instruments of sasine been considered expedient, in respect of there being two charters, we would have seen on inspection of either instrument whether the sasine followed on the *de me* charter or on the *a me* charter. There would have been no occasion for bestowing any pains in preserving the resemblance of the two precepts of sasine to each other. Neither need the Notary have practised any disguise, or avoided the mention of the *modus tenendi*. But in every case of alienation by the double charters, the only information to be obtained regarding the holding from any relative instrument of sasine, is that it followed on a *certain charter*, whereby, &c. and that the lands were to be holden by the grantee *prout in dict. carta specificat*. If any party, when looking into an old progress of writs, of the period when it was usual to grant two alienation-charters, shall happen to discover an instrument of sasine wherein a special *modus tenendi* is mentioned as contained in the charter on which the sasine followed, he will assuredly find *that* to be a case where, by special arrangement, the seller did not grant more than one alienation-charter.

CHAPTER XIII.

ORIGIN OF THE DISPOSITION.

The contract of sale with the formal obligation to infeft, the two Alienation-Charters with precepts of sasine, the procuratory, the instrument of sasine, and the confirmation-charter, were for about a century after being devised the prevailing mode of alienation, but not the only mode—for where the seller's superior was ready to receive the purchaser, or where the character and circumstances of the seller placed him above the suspicion of any fraudulent concealment, or latent defect of title, the alienation was often managed without the contract and with fewer charters.

The Disposition is just the embodiment, into one deed, of the most material clauses of the contract, the dispositive portion of the alienation-charters with their precepts, and the procuratory of resignation. This abridgment of the cumbersome forms came into use by degrees. It was not promoted by any Statute or Act of Sederunt, and may chiefly be ascribed to the greater skill naturally acquired by the man of business from practice or experience. The improvement was long retarded, however, by an absurd prejudice in favor of Latin, or an erroneous notion that those writings which were then considered essential links in a progress of titles could not be valid or effectual unless expressed in that language. The contract as originally devised did not contain dispositive words. Its purpose was merely to state the terms of the bargain, and to bind both parties to its fulfilment. It might therefore be safely expressed in the language of business; but

such was not the case with regard to the charters, or even to the instrument of sasine till after the invention of the disposition.

The contract, as already remarked, was often dispensed with. In lieu thereof a unilateral deed was on such occasions made use of, containing the formal obligation to infeft, and, in course of time, even dispositive words; but the Latin-charters were not thereby superseded. Sasine on pure alienation could not then have otherwise been obtained. Another improvement was the insertion of a procuratory of resignation in the unilateral deed, as was sometimes the case in the contract before it was discontinued. But if entry was not obtained by resignation, the alienation-charters were still requisite, or at least the *a se* charter. At last, however, one or two men of business, bolder or more skilful than their neighbours, ventured to insert a precept of sasine in the unilateral deed, and the great improvement was achieved. A very few examples from real occurrences will suffice to illustrate those progressive changes. I have not thought it right to mention the names of the lands in the following examples, or of the sellers or purchasers, except on the latest occasion. The intended illustrations can be understood equally well without these particulars. I might likewise have shown that the improvements were forwarded by borrowing from the Wadset—the rights of a creditor being more respected by the old laws of Scotland than those of a purchaser—but was desirous of making my explanations as little involved as possible.

(1.) Bond or obligation (somewhat abridged) by a seller to a purchaser, in lieu of the mutual contract, but without any dispositive words, or any procuratory or precept.

[*8th June* 1603.]

Be it kend till all men be thir present letters, me A B for the sowme of 3000 merkis in gold and silver, guid and usuall numerat money of this realme, instantlie at the making heirof thankfullie contentit payit and delyverit to me be my weilbelovit friend C D

quhairof I hald me weill content satisfeit and compleitlie payit, and for me my airis executours and assigneis exoners quytclames and simpliciter discharges the said C D his airis executours and assigneis of the samyn for now and ever—Thairfoir to be bundin and obleist, and be the tenor heirof faithfullie binds and obleisses me with all possible diligence, dewlie and sufficientlie to infeft and seas the said C D his airis and assigneis in All and Haill the forsaid lands, &c. be twa several infeftmentis, the ane thairof to be haldin of me my airis and assigneis in frie-blenche, for payment yeirlie of twa pair of spurs at the feist of Witsunday in name of blenche-ferme, gif the samyn beis askit allanerlie; and the uther to be haldin of the immediat superiour thairof, in frie blenche lykwayis, for payment yeirlie of the said twa pair of spurs at the said feist, in name of blenche-ferme, gif the samyn beis askit allanerlie; and that ather be resignatioun or confirmatioun as best sall pleis the said C D or his forsaids for their securitie to devyse; and to that effect to mak subscryve seill and delyver the said twa infeftmentis conteining precepts of seasing thairintill, maid for sowmes of money *titulo oneroso:* Lykas, gif the said infeftmentis and richts were now alreadie maid and past, now as than, and than as now, I faithfullie bind and obleiss me my airis and assigneis to warrand the lands above written, &c. against all deidlie as accords of the law. And for the mair securitie I am content and consents that thir presents be insert and registrat, &c.

(2.) A deed of alienation containing dispositive words, and obligation to infeft by double charters, but without procuratory or precept.

[1*st June* 1608.]

Be it kend till all men be thir present letters me A B heretable proprietor and fewar of the landis and utheris underspecifeit, forsamekill as C D hes presentlie contentit payit and thankfullie delyverit to me, really and with effect, in numerat money, the soume of sex thousand merkis usual money of this realme of Scotland, quhairof I hald me weill content satisfeit and payit, and exoners quitclames and discharges the said C D his airis executoris and assignais of the samyn for now and ever,—thairfore witt ye me to haif sauld annaleit and disponit, and be the tenor heirof sellis annaleis and disponis to the said C D and his airis and assignais quhatsumever, heretablie and irredimablie, but ony reversioun re-

demptioun or regres, All and Haill, &c. And I be thir presents bind and obleis me and my airis immediatly after the dait heirof to dewlie and sufficientlie infeft and seiss be chartors and sesingis *titulo oneroso* in competent and dew forme, the said C D and his foirsaidis in all and haill, &c. and that be double infeftmentis, the ane to be haldin of me and my foirsaidis in frie blenche, for payment of ane penny at Witsonday upone the ground of the saidis landis in name of blenche-ferme, gif it be askit, and for payment to my immediat superiors of the few males and dewteis of the same contenit in my infeftmentis thairof allanerlie; and the uther of the saidis infeftmentis to be haldin of my immediat superiors of the foirsaidis landis as frelie as I hald the samyn; and that be resignatioun or confirmatioun as best sall pleis the said C D and his foirsaidis—and I bind and obleis me and my airis to warrand the foirsaid lands, &c.

(3.) A Deed of Alienation, containing in most ample form dispositive words and obligation to infeft, also Procuratory of Resignation, but no Precept of Sasine.

[29*th November* 1619.]

Be it kend to all men be thir present letters me A B—forsamekill as C D has presentlie at the dait hereof and with effect contentit payit and delivered to me certain great sowmes of money, &c. Thairfor witt ye me to have sauld annalzied and disponed, lykeas I be the tenor hereof sells annalzies and purely and simpliciter dispones to the said C D his heirs and assigneys, heritably and irredimably without any reversion regress or redemption whatsoever, All and Haill the lands, &c.—And oblidges me and my forsaids, with all diligence, to infeft and sease duely validly and sufficiently *titulo oneroso* the said C D his heirs and assigneys in all and haill the foresaid lands, &c. and that by two severall charters and infeftments of pure alienation made for soumes of money, duely sealled and subscryved with my hand, with clause of warrandice therein written, in sure large and ample form, as the said C D and his forsaids sall please devyse for their own security, with precepts of seasines thereintill; the ane therof to be holden of me my heirs and successors in free Blench, for payment of ane penny usual Scots money at Whitsunday upon the ground, gif it be asked allenarly; and the other infeftment to be holden frae me and my forsaids of

my immediat superiors in the same manner as I hold the same lands myself, and that by confirmation or resignation, &c. And also I the said A B hereby makes constitutes and ordains my very lawful undoubted and irrevocable actors procurators and speciall errand bearers, conjunctlie and severallie, giving granting and committing to them and ilk ane of them my full free and plain power, express mandament bidding and charge, for me and in my name and upon my behalf to pass whatsoever day and place lawful, and there, with all due reverence and humilitie as use is, to resign renunce surrender upgive and deliver, frae me and my forsaids, all and haill, &c. in the hands of my immediat lawful superiors thereof or their commissioners having power to receive resignations and grant new infeftments thereupon, and that in favours and for new heritable and irredimable infeftment to be given and granted to the said C D and his forsaids in due and ample form as effeirs; acts instruments and documents to ask and take, &c.

(4.) A Disposition (slightly abridged) containing every essential Clause, Obligation to infeft *a me vel de me*, Procuratory of Resignation, and Precept of Sasine—the earliest of the kind I have ever seen.

[21*st December* 1641.]

Be it kend till all men be thir presentis me James Wallace Oy to umq^{ll} William Wallace in Chirnsyde, for ane certain sowme of money payit and delyverit to me be George Broun indweller in Chirnsyde, in name and behalf of Robert Broun his eldest lawfull sone, quhairof I grant the ressait, and for me my airis and executoris exoneris and discharges thame and all utheris quhom it effeirs therof for evir,—thairfoir to have sauld annaleit and disponit, and be the tennor heirof sellis annaleis and disponis, fra me my airis and assignayis irredimablie, without ony reversioun redemptioun or again-calling quhatsumevir, to the said Robert Broun his airis and assignayis quhatsumevir, All and Haill these my twa merklandis and thrid pairt of a merkland with houses, &c. Exceptand and reservand to the said George Broun and Helene Wallace his spous, thair lyferentis of the samyn and to the langest levar of thame twa: And I the said James Wallace faithfullie bind and obleis me to dewlie and sufficientlie infeft and sease the said Robert Broun his airis

and assignayis forsaidis heritablie and irredimablie as said is, in All and Haill the forsaidis twa merklandis and thrid part of a merkland with houses, &c. and that be dowble and severall infeftmentis —the ane thairof to be haldin of me and my airis in frie blenche, for payment of ane penny yeirlie upon the ground of the said land at Witsonday, gif the samyn beis askit allanerlie, and the uther of the saidis infeftmentis to be haldin fra me and my airis of the right excellent right hich and mightie prince our soverane lord the kingis majestie, my immediat superior of the saidis landis, sicklyke and als frilie in all respectis as I hald the samyn myselff befor the making of this my Dispositioun—be resignatioun or confirmatioun as best sall pleis the said Robert Broun and his forsaidis: and to the effect the said Robert Broun and his forsaidis may obtein thameselffis to be dewlie infeft and seasit in all and haill the saidis twa merklands, &c. wit ye me to have maid, constitut, and ordanit and be thir presentis maks constitutis and ordainis

and ilkane of thame conjunctlie and severallie, my verie lawfull undoubtit and irrevocabill prōris actoris factoris and speciall erand beireris to the effect underwritten; Giveand, grantand, &c. my verie full frie plane power, generall and speciall command, expres bidding and charge, for me and in my name and upon my behalff, to compeir befor the said right excellent, &c. my immediat superior of the landis abovewritten, or the lordis of his hienes privie counsall, commissioneris and having power of his majestie to receave resignationis of landis and utheris halden immediatlie of his hienes, and to grant infeftmentis thairupoun, quwhatsumevir day or dayis place or places neidfull; and thair with all dewtifull reverence and humilitie as becometh to resigne renunce frilie quytclame and overgive, purelie and simplie be stalff and bastoun as use is, fra me my airis and assignayis, in the hands of our said soverane lord, or his said commissioneris All and haill, &c. and that for heritabill infeftment to be maid and given thairof to the said Robert Broun his airis and assignayis forsaids heritabillie and irredimablie, in sic dew and competent forme as effeirs; exceptand and reservand as is befoirexceptit and reservit, and thairupon actis instrumentis and documentis to ask tak and raiss, and generallie all and sindrie uther thingis necessar in the premisses to do quhilk to the office of procuratorie of law and consuetude of this realme is knawin to perteine, and quhilks I might do myself thairin

gif I wer personallie present: (Then follows clause of warrandice of the lands "againes all deidlie as law will," and clause of delivery of the writs—then the following precept of sasine:) And for the said Robert Broun his farder securitie and obteining him infeft and seasit in the forsaidis landis, Wit ye me to have maid constitut and ordanit, and be thir presentis makis constitutis and ordanis James Wichtman in Chirnsyde and ilkane of thame conjunctlie and severallie my baillies in that pairt, to pass at the sight heirof, and give heritabill stait and seasing corporall actnall and reall possessioun of all and haill the forsaid twa merklandis, &c. (reservand as is befoir reservit,) to the said Robert Broun or his lawfull actornayis in his name beireris heirof, be delyverance of eird and stane of the landis forsaidis, conform to the tennor of the dispositioun abovewrittin and chartor to follow thairupoun in all poyntis—the quhilk do I commit to you conjunctlie and severallie my full power. And for the mair securitie I am content and consentis that thir presentis be insert and registrat in the buikis of Counsall and Sessioun, or Sheriff Court buikis of Berwik, and be decernit to have the strenth of ane decreit of the Lordis of Counsall or Sheriff forsaid and thair authoritie respective to be interponit heirto, that letters and executoriallis of horneing poynding and utheris necessar be direct heirupon on ane simple charge of sex dayis onlie; and for registrating heirof constitutis my procuratoris, &c. In witnes whairof (writtin be Johne Dewar younger Notar in Dunss,) I have subscryvit thir presentis with my hand, at Chirnsyde the twenty-ane day of December the zeir of God 1641, befor thir witnesses Robert Craw portionar of Eist Restoun, the said Johne Dewar, and James Home sone to Umq^{ll} Mark Home in Chirnsyde.

(5.) Instrument of Sasine following, same day, on the precept in the above Disposition.

[21*st December* 1641.]

In Dei Nomine Amen—Per hoc præsens publicum instrumentum cunctis pateat evidenter et sit notum, quod anno incarnationis dominicæ millesimo sexcentesimo quadragesimo primo, mensis vero Decembris die vigesimo primo, regnique S. D. N. Regis Caroli Dei gratia Magnæ Britanniæ Franciæ et Hiberniæ fideique defensoris

anno decimo septimo; In mei Notarii Publici et testium subscriptorum præsentiis, ane discreit man James Wichtman indweller in Chirnesyde, baillie in that pairt speciallie constitut be James Wallace Oy to Umq^{ll} William Wallace thair, to the effect underwritten, past to the ground of the landis efterspecifeit, and thair Robert Broun eldest lawfull sone to George Broun in mid-town of Chirnesyde exhibite and presentit to the said baillie ane Dispositioun conteining ane precept of seasing thairintill, maid and grantit be the said James Wallace under his subscriptioun manuall, to the said Robert Broun his airis and assignayis quhatsumever of the dait of thir presentis, quhairby the said James Wallace for ane certane sowme of money payit and delyverit to him be the said George Broun in name and behalff of his said sone, sauld annaleit and disponit, fra him his airis and assignayis irredimablie, without ony reversioun redemptioun or agane-calling quhatsumevir, to the said Robert Broun and his forsaidis, All and Haill, &c. Reservand, &c. To be haldin (either) of the said James Wallace and his airis in free-blenche for payment of ane penny yeirlie upon the ground of the said land at Witsonday gif the samyn beis askit allanerlie; or of his immediat superior thairof siclyke and als frilie in all respectis as the said James Wallace haldis the samyn himselff; and that be resignatioun or confirmatioun as best sall pleis the said Robert Broun and his forsaidis to devyse: Requyreing the said baillie for dew and exact executioun of the said precept of seassing contenit in the said Dispositioun—The quhilk foirnamit Dispositioun the said James Wichtman baillie receavit in his handis, and delyverit the samyn to me Notar Publict undersubscryvand, to be published and red—Off the quhilk precept of seasing contenit thairintill the tennor follows: "And for the said Robert Broun his "farder securitie and obteining him infeft and seasit in the forsaidis "landis, wit ye me to have maid constitut, &c. (*usque ad*) con- "junctlie and severallie my full power." Eftir reiding of the quhilk Dispositioun and precept of seasing contenit thairin, the said James Wichtman baillie, be vertew of his said office of baillierie, past to the ground of the said twa merkland and thrid pairt merkland disponit and lyand as said is, and thair gave heritabill stait and seasing, corporall actuall and reall possessioun of the samyn, (Reservand as is befoir reservit,) to the said Robert Broun personallie present, be delyvering to him of eird and stane thairof

as use is, conform to the tennor of the said Dispositioun precept of seasing insert thairintill, and according to the charter to follow thairupoun in all poyntis. *Super quibus omnibus et singulis præmissis, præfatus Robertus Broun sibi a me Notario Publico subscripto fieri petiit Instrumenta Publica. Acta erant hæc super solum et fundum dictarum terrarum, hora undecima ante meridiem aut eocirca—præsentibus ibidem Roberto Craw portionario de Eist Reston, Jacobo Home filio quondam Marci Home in Chirnesyde, et Jacobo Frissell ibidem; testibus ad præmissa vocatis pariterque rogatis et requisitis.* (*Recorded in the General Register of Sasines, 3d January* 1642.)

To any person at all acquainted with the heavy forms previously in use, the nature of the *de plano* sasine on a Disposition with an alternative holding would be readily comprehended at one glance. In the above instrument the matter of fact is set forth, that by the Disposition the lands were sold and disponed to be holden either of the Seller in free blench, or of the Seller's Superior in like manner as held by the Seller himself. It could not therefore fail to be at once seen, that the sasine on the disposition, whilst unconfirmed by the Seller's Superior, was a sasine in the *dominium utile* holding directly of the Seller as temporary Superior, but liable to be converted by Confirmation into a sasine in the same *dominium utile*, holding permanently of the Seller's Superior. This new practice, besides that a considerable saving of time and expense was thereby effected, possessed the further advantage that the instrument, as regards essentials, was expressed, as well as its warrant, in a language intelligible to buyer and seller. The Contract of alienation and double Charters did not however give place very speedily to the Disposition. Some men of business adhered longer than others to the old forms, and the practice was for some years unsettled and various. But, not to waste time on unimportant or uninteresting particulars, suffice it to say, that in 1666, when the laborious Mr. Dallas of Saint-Martins began his bulky compilation (completed in 1688), those cumbersome forms had gone so entirely out of use, that

he, prolix and minute as he generally is, has not deemed it necessary to remark that any such forms had ever existed.

Having thus casually come to notice Mr. Dallas's work, I think it right to mention that before it was published (1697) the Scottish practitioner had no printed forms for his guidance. Each had his own collection of manuscript forms. Till then, and for many years afterwards, diligent young men, when serving as clerks or apprentices in the office of a man of business, were accustomed to keep each his own manuscript style-book, for collecting together such forms occurring in practice as in his apprehension might prove useful to him when he should come to be entrusted with business of the like kind.

As however it might not be considered altogether proper to pass with so slight a notice the great collection above referred to, I have to request the reader's attention to a remarkable specimen (page 777) of the practice in Mr. Dallas's time, or rather of his own practice—for many of his forms relate to real transactions in which he had been employed. This specimen shows how well he was acquainted with the nature of the feudal forms then in use. It is a laboriously prepared form of a Disposition, of 1st, the Property and Superiority of some lands held by the Disponer by *one* title Ward of the Crown; 2ndly, the Superiority of other lands also held Ward of the Crown, and whereof the Property was held by another party Ward of the Disponer; and 3rdly, the Superiority of lands held of the Crown partly in feu-farm and partly in blench-farm, and whereof the property was likewise held by the vassals partly feu and partly blench. After the dispositive words and the descriptions, the granter binds himself to infeft the disponee heritably and irredeemably, in parcels 1st and 2nd by Resignation. The disponer does not insert a *tenendas a se*, or any other *tenendas* in relation to these lands, plainly because they were held ward. But, with regard to all the other lands, he bound himself to infeft "by "double infeftments and manner of holdings, the one thereof "to be holden of me and my foresaids in free blensh, for pay-

" ment of one penny Scots money, upon the ground of the " saids lands, at the feast of Whitsunday yearly, in name of " blensh-farm if it be asked allennarly, and relieving me and " my forsaids at my superiors' hands of the duties due and " payable by us to them furth thereof in time coming; and the " other of the saids infeftments to be holden from me and my " foresaids of my saids superiors, sicklike and as freely in all " respects as I held or may hold the same myself; and that " by resignation or confirmation in their option—the accepta- " tion of the one to be no ways prejudicial to the other." At the end of the form he cautions the practitioner never to insert a barony if held ward, or whatever else may be holden ward, in a precept of sasine, "lest an inadvertant Nottar " take seasing, and so recognosce the barony and what else " ward; as a Nottar did to Provost Grahame in Drumfreis, " whose creditors suffered much by it: and to prevent the like, " this disposition only bears an obligement to infeft in the " barony and what else ward, by Resignation; whereas the " other lands disponed, holding feu or blench, is by double " infeftments."

From the date of Mr. Dallas's publication, 1697, till 1787, the date of the first edition of the first volume of the Juridical Styles, there appeared several books of Forms on a smaller scale, none of which seem to claim special notice, if we except an anonymous treatise of 1734 concerning Fees (or Feus), termed on the title-page a supplement to Spotiswood's Introduction. George Chalmers, in his *Life of Ruddiman*, p. 139, calls this a Posthumous Treatise of Ruddiman's old friend John Spottiswoode; but the work itself contains clear internal evidence that he was not the author. The late Professor Macvey Napier was of opinion that it was written by a person of the name of James Mackenzie, but who or what he was he did not know, nor can that now be a matter of any importance. The reader may, if he chooses, see at page 57 of that rather clever but by no means faultless work, a fine example of neatness and accuracy for that age, in the form of a Disposition granted in 1727 by the Parliamentary Commissioners

for the sale of the estates forfeited in consequence of the rebellion of 1715, in favor of one of the purchasers. The commissioners, it is obvious, could not grant a valid obligation to infeft, to be holden *a se vel de se*, or even *a se de superiore suo*—neither could they grant a valid precept of sasine. They were mere instrumentary transferers. But being expressly authorized by the statute to resign, they could grant a valid procuratory of resignation. The Disposition accordingly contains an ample conveyance, without any obligation to infeft, but with a distinct specification of the intended *modus tenendi*. "Which lands and others above denominated " are to be held in the following manner towit, such of them " as the late proprietor held of the Crown are to be held of " the Sovereign and his successors in free blench, for payment " of a penny Scots money at the Feast of Whitsunday yearly, " on condition that the same is required; and such of them " as were held of subaltern superiors are still to be holden of " their respective superiors, by the same tenure and as freely " in all respects as the said D (the late proprietor) held of " them himself." Then follows a procuratory for resignation in the hands of the respective superiors, " or of their commis- " sioners having power to receive resignations on their behalf; " in favour and for new infeftment thereof to be granted back " again to the said F his heirs or assigns whatsoever, herit- " ably and irredeemably, in due and competent form."

In the appendix to Crawfurd's Officers of State there is an article, No. 29, bearing to be a Disposition in the Scottish language, of the great baronies of Cowie and Durris, in the county of Kincardine, by William Fraser Lord of Philorth, to William Hay Lord of Errol, constable of Scotland, dated 10th October 1413, being more than two centuries earlier than the period I have assigned for the first appearance of the disposition. But truly it is not a disposition at all. It does not contain a single dispositive word, or any of the essential clauses of a disposition, and never could have been

regarded as forming a link in any progress. Nothing in the least resembling it is to be found anywhere else. In fact it is just a kind of crude minute of sale ; and, if it be a copy of a genuine writing, which I cannot believe till I know better about it, it is, at least in the latter half, a very indistinct copy. From Robertson's Index, p. 160, No. 11, it appears that Robert Duke of Albany, as Governor of Scotland, granted the Constable a charter of the first-mentioned barony, on the resignation of Fraser of Philorth ; but unfortunately the roll in which the charter was registered is lost, so that unless access can be had to the original, nothing more can be said on the subject.

CHAPTER XIV.

CONSOLIDATION.

THE doctrine that separate sets of titles to the same lands carried separate rights, and that the lower investiture ought to be consolidated with the higher by resignation *ad remanentiam*, was long reasoned upon by theorists before it was regarded by the practitioner. Some lawyers talked about the higher investiture when obtained, instantly absorbing the lower. But the doctrine of *ipso jure* absorption, judging from samples of ancient practice in old progresses, was never a recognised principle in the law or practice of Scotland. Before the case of Bald *v.* Buchanan, to be particularly noticed hereafter, the only relative principle with which the practical conveyancer was acquainted was this, that a proprietor could not at one and the same time hold the same estate of two different superiors; and therefore when a client had two sets of titles, an upper and a lower, the possession was attributed to the upper, and the lower was regarded as superfluous, or at best as only a corroborative right. This was very convenient whilst the double charters were in use. Before confirmation the purchaser's sasine applied to the very estate purchased, as holding *pro tempore* of the seller. The effect of confirmation when obtained was to dissolve all the seller's connexion with the lands, and to convert the temporary investiture into a different one, holding no longer of the seller but of the seller's superior. In fact the whole right sold to the purchaser was carried by the confirmed investiture, and all concerned might then safely hold the seller's *de se* charter as no longer of any utility.

But it is not always safe to disregard subordinate titles. For example, let it be supposed that the purchaser, after obtaining sasine on the two alienation-charters, and being thereby invested in an estate holding *pro tempore* of the seller, shall, in place of entering with the seller's superior by *confirmation*, resign on the seller's procuratory and be infeft on a *Resignation-Charter*,—then he would have two superiors, two investitures, two sasines on the separate warrants of different individuals—in fact two separate estates. The man of business of the old school would have thrown aside or neglected the inferior investiture as useless. But in a later age it was understood, that though the neglected sasine was unconfirmed, yet having a superior and a vassal in the seller and purchaser, it carried the *dominium utile*, so that the resignation investiture could carry nothing but a bare mid-superiority. Hence first arose the notion of the expediency of consolidating the two rights by resignation *ad remanentiam*, yet practically it was long little regarded. In some old progresses the three charters and two sasines are often found together, without any writ relating to a resignation *ad remanentiam*. Indeed, no legal formality ever proposed was adopted with more reluctance than the resignation by a party in his own hands. It was not till long after the invention of the disposition containing procuratory and precept that it occasionally appeared in practice. Even then its nature was not generally understood, nor was consolidation in any case considered absolutely necessary, till the point was settled so lately as 1786 by the case of Bald *v.* Buchanan. It is true that mention is made of resignation *ad remanentiam* in statutes of the Scottish Parliament, so early as 1555, c. 38, and 1563, c. 81—but these either relate to resignations on sales by vassals to their superiors, or to the then usual mode of extinguishing redeemed wadsets; but could have no application to the case of an heritor already in possession on two separate investitures, and causing the higher to absorb the lower *by resignation in his own hands*. The grand obstacle to the adoption of such form was the fancied inconsistency of a party

granting any manner of Deed in his own favor. Sir John Nisbet of Dirleton, who for thirteen years—1664 to 1677—was Lord Advocate to Charles II, and at the same time one of the Lords of Session, proposed various queries regarding consolidation. He did not well know what to make of it, and could not understand whether it was the effect of absorption or of confusion. Both he, and his commentator Steuart of Goodtrees, were evidently of opinion that should a person who is duly vested in the *property* of lands acquire and be infeft in the *superiority*, consolidation would take place *eo ipso;* neither of them being aware of any form of procedure necessary to be employed, or that competently could be employed for that purpose. "When a vassal," says Steuart, "acquires and is infeft in the *superiority*, the *property* seems "to be swallowed up in a consolidation." But, inquires Sir John, what shall be the case, "if the superior succeed as heir "to the right of the property?"—and he answers, that by his acquiring the property and entering to the right thereof, consolidation must take place *fictione juris*, or *ipso jure;* because "the superior could not infeft himself." Goodtrees was not satisfied with this reasoning. "If," says he, "the superior "succeed as heir to his vassal in the property, his service "will bear, that the lands did hold of himself: and though "it may seem that he cannot decently infeft himself, yet it "is thought he may: And, however, there should be some "public Deed on record, to make the consolidation appear."

In point of fact I have seen several old retours, where the inquest find that the deceased died last vest and seased in the property or *dominium utile* of the lands, holding of the claimant as immediate lawful superior thereof, and that in virtue of the retour of service the property is now consolidated with the claimant's right of superiority.

Dirleton was of opinion that if a proprietor of lands destined to *heirs-male*, should grant a feu-right in favor of his son, and his *heirs-whatsoever*, and if the son after being infeft on such feu-right, should succeed to and be infeft in the superiority as his father's *heir-male*, there would "during his life-

" time be a kind of consolidation, seeing he cannot be superior " to himself." The meaning seems to be, that he could not consistently possess the lands on a property-title and a superiority-title as separate rights. A temporary consolidation must take place; the vassalage-title would go into abeyance during his lifetime, in consequence of the greater excellence of his superiority-title. But this state of matters " will cease " by his death, so that the *superiority* will belong to his *heirs-* " *male*, and the *property* to his *heirs-whatsoever*." Therefore should it be his intention that there should be a permanent consolidation, and " if he was infeft *first* in the property and " *then* in the superiority, he must dispone the property to a " confident—and the confident being infeft must resign *ad* " *remanentiam*, to the effect the property may be consolidate " with the superiority to him and his heirs-male and their " successors." In Steuart's opinion it was " more reasonable " to judge, that by serving heir to his father the superior, the " property is absorbed, and will not revive again."

Speculations like these were little indulged in by the man of business of the old school, who long continued to adhere to the original notion of ascribing his client's possession to his principal investiture. But theorists and practitioners are now alike satisfied that superiority and property, when once effectually disunited (which they may be though held by the same individual under the same destination), form two estates, and must always do so till reunited by resignation *ad remanentiam*, unless where the subordinate title has been sopited by the long prescription. It may also be adduced as a proof that legal maxims, however long cherished, may come in time to be disregarded, that we now see no incongruity in a man being his own superior, and either in that character or as vassal to himself, granting a Deed in his own favor. Yet a vestige of ancient prejudice is still kept up in the legal maxim, that debts affecting lands may be, in certain cases, extinguished *confusione*. For example, if the proprietor of an estate grant an heritable security in favor of a relation, and afterwards succeed as such person's heir, the debt is extinguished *confu-*

sione, because (as Erskine has it, III. iv. 23) "no person "can be creditor or debtor to himself." But might it not be plausibly argued, that to be consistent with the law regarding separated property and superiority, this maxim ought not to be extended to heritable securities appearing on the sasine record? If it be the wish of the party, who by succession or otherwise has become both debtor and creditor, that the debt should cease to exist, cannot he grant a discharge in his own favor, as easily at least as a procuratory of resignation *ad remanentiam?* And ought he not to do so, as well for the sake of his successors as for the sake of maintaining the perfection of the publication records? To all which this may perhaps be a sufficient answer, that it would be highly proper to clear the record, but that it might often be attended with very inconvenient consequences to hold that no debt once appearing on the record should cease to subsist till expunged by a discharge. At all events, and although consistency be ever so desirable, it would not be right to suffer the stringency of the law regarding disunited property and superiority to be relaxed. The disjunction may have been effected of set purpose, or may have happened inadvertently from pure oversight, or from want of skill. A sasine may include property and superiority united, or both of them disunited, or property *per se*, or superiority *per se*, or an accidentally created midsuperiority, or it may, owing to some radical defect, carry no right whatever. It would be too fatiguing to any reader to have all this explained by examples; but, if all true, it can occasion no surprise that mistakes may be committed in a variety of ways, and that in a complicated progress a serious defect may long exist without being detected—indeed may not be detected till some untoward event has ensued. I may add, that unskilful attempts to rectify errors may often lead to worse consequences, and that where the least ground for doubt exists, no person should have recourse to the forms of consolidation by resignation *ad remanentiam*, unless by education or practice he be thoroughly qualified to understand

the nature and effect of each and every sasine on the lands within the compass of the long prescription.

The case of Bald *v.* Buchanan (8th March 1786, affirmed 3d April 1787) put an end to all speculation regarding equivalents. If it did not create new law, it cleared up the old, as if a statute had been made of purpose. It virtually declared that the law of Scotland never recognised *ipso jure* consolidation, and that if property and superiority have been disunited, they constitute two separate estates, and cannot be again united or held by one set of titles, till consolidated by resignation *ad remanentiam.*

But, by the law of prescription, a case may occur where a subordinate title, long dormant, may expire of its own accord, without the necessity of being resigned *ad remanentiam.* In other words, a separate *dominium-utile* investiture, if not possessed upon, may be superseded or sopited by natural possession on a superiority-investiture, during the period of the long prescription. Thus: let it be supposed that A holds the superiority of his estate as Crown vassal, and the property by a separate investiture as his own vassal, and that he dispones the estate to B with procuratory and precept—and let it be supposed that B makes no use of the precept, but resigns on the procuratory, and obtains investiture as Crown vassal. Let it also be supposed that B enters into the natural possession, and that he and his successors enjoy the rents and profits continuously for forty years on Crown titles as their only titles—then these will be held to include property as well as superiority—the separate dormant property-title will have become extinct by dereliction.

At the same time, it is not impossible that such dormant title may be competently resuscitated with little trouble; but in that case, care must be taken to get it effectually extinguished before any harm ensues.

From the Faculty-Report of the above-mentioned case of Bald *v.* Buchanan, it appears that the Court repelled the defender's plea of Prescription, as well as all her other pleas;

but by reason of the scarcity of dates condescended upon in the Report, it is not easy to see precisely on what title and what particular period of possession the defender founded her plea of Prescription—or whether within the limits of the case, there was any title or period of possession on which the defender could have founded a plausible plea of prescription.

As the case is an important one, from every branch of which valuable information may be gleaned regarding the nature of the titles to landed property in Scotland, I beg leave to insert here the statement of facts in the Report referred to, with some slight verbal alterations, supplying at the same time sundry dates omitted in the Report, from a printed duplicate yet extant in the Advocates' Library, of a full Reclaiming Petition in the case. It is impossible to state the facts within a very narrow space, as the questions at issue related to the titles of *two* estates differently circumstanced.

Case of Lillias Bald against Jane Buchanan. Decided 8th March 1786, affirmed 3d April 1787. Fac. Coll. No. 266. Morr. p. 15084.

In 1705, Archibald Buchanan, who previously stood vested in the *dominium utile* of the two estates of Cameron and Drummakill, in the county of Dumbarton, obtained a disposition to the *superiority* of Cameron, containing a procuratory of Resignation. This Disposition, as it contained no limitation, might be viewed as including *dominium utile* also. The *dominium utile* was, however, excepted from the clause of warrandice, according to the usual practice of some men of business in dispositions of superiority.

In the same year, 1705, the said Archibald Buchanan executed a gratuitous Deed, conveying the estate of Cameron to himself in liferent, and to his eldest son William Buchanan, and a certain series of heirs in fee; which Deed contained an Assignation of the foresaid procuratory, and a reserved power to alter.

By virtue of the procuratory thus assigned, a Crown Charter of Resignation was expede in 1706, and sasine followed thereupon in favor of himself and his said son, for their respective interests of liferent and fee.

In 1730 the same Archibald Buchanan, in his son's marriage-contract, disponed, under the reservation of his own liferent, both estates of Drummakill and Cameron, with procuratory and precept, to him and a series of heirs somewhat different from that in the former disposition. William was infeft on the precept in January 1731, but never acted on the procuratory. He predeceased his father, leaving a son Archibald, and a daughter Lillias. He was likewise survived by a brother Robert. William never attained the *natural* possession, having been all along excluded by his father's liferent. He died in 1749, and his father in 1761.

Archibald the grandson made up titles in 1762 and 1763, to Cameron, by special service and sasine on precept from Chancery, as heir-male of William his father, and to Drummakill, by sasine on precept of *clare constat*, as heir-at-law to the first-named Archibald, his grandfather.

On the death in 1768 of Archibald the younger, the succession opened to his uncle Robert Buchanan, who made up titles as his nephew's heir, to Cameron in 1769 by special service and sasine on Chancery-precept; and to Drummakill in 1770 by sasine on precept of *clare constat*.

Robert, on 27th November 1774, executed an entail of both estates, in favor of Jane Buchanan, his natural daughter. He died in July 1780.

Of this entail Lillias Bald, the daughter of Lillias Buchanan, as heiress-at-law of William Buchanan, instituted a Reduction, on certain articulate grounds, inferring the insufficiency of the titles made up by the entailer to have vested him in the *dominium utile* of either estate.

According to the Report, the defender's plea of Prescription was founded on the Crown Investiture of 1706, in the superiority of Cameron, as being "a good title for the prescription of "the property." But from the above statement it may be seen that William Buchanan, the fiar in the Crown Investiture, had no possession of or right whatever to the *dominium utile* of Cameron, till it was conveyed to him by his father on the occasion of his marriage. Before that event it had been possessed by his father for many years on a separate subordinate title. So that till then prescription of the property had not

begun and could not have begun to run on the superiority title—much less could the subsequent possession of the property, during William's lifetime, be ascribed to the superiority title, after the date of the sasine on the precept in his marriage-contract.

With regard to Drummakill, it is plain that by the base investiture of 1731, William Buchanan was validly vested in the *dominium utile* of that estate, subject to his father's liferent, and holding of him as temporary superior. So that Archibald the younger should have made up his title by charter of confirmation and precept of *clare constat*, as heir of provision under the destination in his father's contract of marriage, and not by *clare constat* as heir-at-law to his grandfather.

But the chief point in this great case is that the Court, in reference to the property and superiority titles of the estate of Cameron, rejected the plea of *ipso jure* consolidation.

CHAPTER XV.

INSECURITY OF THE A ME HOLDING.

§ 1. *The use of this form forced on the unwary, by ill-drawn prohibitions against subfeuing.*

In the year 1767 an Act of Parliament was obtained (7th Geo. III. c. 27) for extending the Royalty of the City of Edinburgh, over various grounds to the north and north-east of the Old Town, then belonging partly to Heriot's Hospital, partly to the magistrates as representing the community, and partly to other proprietors. Plans of fine streets and squares were devised and adopted, and the grounds were feued off in lots for building purposes. At the same time, in order to prevent the builders from granting subfeus of the dwelling-houses when erected, which might have proved exceedingly inconvenient to all concerned, a provision in some such terms as the following, was inserted in the original Feu-charters and Feu-contracts:—

Providing always and declaring, as it is hereby specially provided and declared, that it shall not be competent to nor in the power of the said A. B. or his foresaids, to subfeu, or to sell or dispose of all or any part of the piece of ground hereby feued, or of the houses built or to be built thereon, so as to be holden of themselves, or of any other interjected superior, but allenarly to be holden of and under us and our successors in office, as superiors, in all time coming; without prejudice nevertheless to the said A. B. on his foresaids to grant heritable securities on the foresaid property, or to exercise any other act of ownership which may not be inconsistent with the manner of holding hereby prescribed.

The experienced conveyancer will readily admit that injudicious revisals often lead to unhappy consequences. Nothing more was requisite, on the occasion in question, than to provide against the Builders interposing themselves as middlemen between the superiors of the grounds and the purchasers of the dwelling-houses when erected. But what has that to do with the granting of heritable securities? The exception in favor of these, doubtless originating with a remarkably ingenious Reviser, is only calculated to mislead. A Disposition with an alternative holding is not a subfeu—nor was it ever usual to grant heritable securities in the form of subfeus. But the direct tendency of the exception is to impress the idea that an heritable security is a more privileged affair than a disposition on a sale—and that a Bond and Disposition in security in ample form might validly contain an *a me vel de me* holding, or might even be granted in the form of a subfeu; but that a disposition on a sale, and even a gratuitous disposition, can only be granted to be holden away from the disponer of and under the granter of the original feu-right, otherwise the prohibition is infringed,—and well for the offender that it has not been fenced with a clause of forfeiture.

Improving on the original idea, it has occurred to some, and may yet occur to other men of business of the sharp-practice school, ambitious of being thought particularly watchful over the interest of their employers, that an infringement of such a prohibition ought to be severely punished. It is not enough that their employers should have their just rights, or that the infringement cannot occasion them the slightest loss or inconvenience. They must be gratified, if such be their pleasure, even in their caprices. The following improved form, devised by an adept in the art of petty-tyranny has been greatly admired:—

Providing, &c. that it shall not be lawful to nor in the power of the said A. B. or his foresaids, at any time hereafter, to subfeu, sell, or dispose of the piece of ground hereby disponed, or the buildings to be erected thereon, or any part or portion thereof, so as to be held of themselves; but that all Dispositions, or other Deeds of aliena-

tion thereof, shall be granted to be held immediately of and under me, and my heirs successors or disponees, for payment of the feu-duty and performance of the prestations hereinafter written: And, in case the said A. B. or his foresaids shall do in the contrary, then all such sales, grants, or subfeus, holding of them, or in any other manner than of me or my foresaids, with the several Dispositions and Feu-rights, and all that has followed or may follow thereupon, shall *ipso facto* be void and null; and the said subjects shall return to and devolve on me and my foresaids, without the necessity of any Declarator or other process of law for that effect:—With liberty nevertheless to the said A. B. or his foresaids to grant securities over the said subjects, and to exercise every other act of ownership not inconsistent with the manner of holding hereby prescribed.

So that according to the above ingenious form, the vassal when he has occasion to dispone either onerously or gratuitously, must dispone to be holden *a se de superiore suo*, otherwise not only shall his Disposition be null, but the property shall be forfeited to the superior. The superior contemplates taking the law into his own hands. Nullity and forfeiture shall immediately ensue, without the necessity of any application on his part for the aid of judicial authority. Some men of business, when they adopt this form may perhaps mean nothing more than a peremptory prohibition of the alternative manner of holding. If so, they must be grossly ignorant of its nature, because it can do the superior no manner of harm, and because the threatened consequences cannot by possibility take effect. The proprietor for the time being has it always in his power to set himself right with the proper superior, before any harm can ensue. But, as explained in an early stage of this work (p. 11) a superior has no right to challenge or take the slightest notice of any alienation, so long as the last-entered vassal is in life, and so long as the feu-duty is regularly paid. The property may be sold ten times over, without asking the superior's leave—and when at last the fee becomes vacant by the entered vassal's decease, the superior has only to receive the last purchaser or disponee as

his vassal, in the room and stead of the deceased; and such party, if no mid-impediment has been created, will then hold directly of the superior, in the same manner as if the different sellers or disponers had each and all of them expressly alienated to be holden *a se de superiore suo.* But it ought always to be kept in remembrance, that in the case of a number of alienation-investitures standing over unconfirmed, the proprietor for the time being is not secured in the *dominium utile,* unless each and all of them shall have been made according to the alternative form *a se vel de se.*

Similar in some respects to the example last above quoted is the following instance of Glasgow practice. Comparing the two together, it would be difficult to say which exceeds the other in intended severity:—

As also providing and declaring that it shall not be lawful to nor in the power of the said A. B. or his foresaids, at any time hereafter, to subfeu the lands and others above disponed, or any part thereof, or absolutely to dispone the same so as to be held of themselves, but only to be held immediately of and under me and my foresaids, for payment of the feuduties, and performance of the prestations hereinafter written, otherwise all such dispositions or other conveyances shall be void and null; without prejudice however to the feuars' infefting and seasing their lawful wives and husbands in the liferent of the premises, or granting infeftments of annualrent or other redeemable rights affecting the same, to be held base, but so as to be burdened with the payment of the feuduties and others aftermentioned: Providing and declaring also, that all such dispositions, or other rights on which base infeftments are hereby prohibited, shall be presented to me or my foresaids, or my or their agents or commissioners, for Charters of Resignation or Confirmation, within twelve months after the date of the original or first disposition, otherwise the same shall in the option of me or my foresaids be void and null: Declaring likewise that all sales, dispositions, or conveyances of the above or any part of the foresaid lands and others, granted upon terms in violation of or inconsistent with the above provisions, shall be *ipso facto* void and null to the disponees thereof, with all that has followed or may follow thereon for ever.

§ 2. *The same insecure form enjoined absolutely.*

The following recently invented clause may be seen in the latest or fourth edition of the Juridical Styles :—

Declaring that these presents are granted, and that the said subjects are disponed, as aforesaid, with and under the condition following, to wit :—That it shall not be lawful to the said B or his foresaids, to dispone the subjects above described, or any part thereof, to be holden of themselves, or of any other superior than me and my foresaids; and farther declaring that all dispositions, or other deeds of alienation of the said subjects or any part thereof, shall be granted to be holden by one manner of holding only, and that *a me*, for payment of the feu-duty and performance of the prestations after written : And in case the said B or his foresaids shall do in the contrary, then all such subfeus, dispositions, and other deeds, and all that may or can follow thereupon, shall be absolutely void and null, without declarator, and the said subjects shall revert to me and my foresaids; without prejudice to our legal rights and remedies against the said B and his foresaids for payment of the feu-duties, and for implement of the prestations incumbent on them ; but without prejudice to the said B and his foresaids granting securities upon the foresaid property, to be holden of themselves, or to exercise any other act of property not inconsistent with the manner of holding hereby prescribed.—*Fourth Edition*, Vol. I, p. 26.

A noted appeal case of 3d August 1840,—the Tailor incorporation of Aberdeen *v.* Adam Coutts, (Robinson's Appeal Cases, Vol. I, p. 296), is repeatedly referred to in this corner of the Style-Book ; but no benefit is attempted to be deduced from any point or circumstance in the case, so far, at least, as relates to the interest of the vassal, here regarded apparently as a matter of infinitely small importance.

In a subsequent part of this same volume of the Styles, where reference is again made to the prohibition to subfeu, this remark occurs :—" In cases of this kind, we believe it " has been common for men of business to accommodate the

" obligation to infeft, to this declaration of the original " charter:" which I apprehend may be thus translated:— " Some men of business are of opinion, that where the vassal " is by the original feu-right prohibited from subfeuing, the " obligation to infeft must, in any Deed of alienation to be " granted by him, be *accommodated* to such prohibition, that " is, must, in conformity with such prohibition, be confined " to the single manner of holding, *a me de superiore meo.*" The succeeding remarks may be understood without a translation, and indicate more liberal and enlightened views:— " This practice, however, may be dangerous to the disponee, " whose infeftment, in such circumstances, is good for nothing " till confirmed: And we would therefore recommend, that " even where this declaration is fortified by an irritant " clause, a double holding should, in the ordinary case, be " inserted. The plain object of the superior, in such stipula- " tions, must be to secure his proper casualties, or those " money payments to be made in lieu of them; and he can " never have an interest to enforce an irritancy to the extent " of annulling a transaction *bona fide* concluded between " seller and purchaser, but to the effect only of getting im- " plement of the stipulations in his favour. And until a " declarator of irritancy has been actually raised, the superior's " right to refuse an entry to the purchaser, on the terms " contained in the feu-right, may be doubtful."—Vol. I, p. 152.

According to the opinions of the Judges in the above-mentioned Appeal Case, it may be distinctly set down, that a burden or condition imposed on a vassal cannot be binding if contrary to law, or to *bonos mores*, or to the public policy, or inconsistent with the nature of the property feued. Moreover it cannot be binding if simply useless or vexatious, nor unless the superior has an interest to enforce it. But, if not liable to any radical objection, a burden or condition may be made binding, without the necessity of being declared a real burden, or fenced with a clause of irritancy.

In a case referred to in the Report (p. 318), Campbell *v.* Harley, where the superior had inserted a condition that all dispositions and sasines should be prepared by his man of business, otherwise should be null and void, the Court were much divided. The majority supported the condition, whilst the minority held it to be vexatious and illegal. On appeal, the cause was remitted,—which must necessarily have resulted in a reversal, unless it could be made to appear, that according to the law of Scotland, a condition may be unfair and wantonly overbearing, and yet not vexatious. But the cause never came to a judgment. The superior, it is believed, discovered that the condition was injurious to himself, and that his man of business for the time being, was the only person who could ever derive the least benefit from it.

A superior has a right to prohibit subinfeudation, or the interposition of a mid-superior between himself and the *dominium utile;* but if the vassal has a right to alienate, (which surely will not now-a-days be called in question), the superior can have no right to debar him from using a valid and secure, or to compel him to use an insecure, form of alienation. Why should a prohibition to subfeu be supposed to carry that meaning? The agents for the City of Edinburgh, or for Heriot's Hospital, were never known to challenge an alienation by any of their vassals to be holden *a se vel de se.* And why should any purchaser imagine that he is bound to accept of an investiture that shall be worthless till confirmed? or why should he be *prematurely* subjected to the payment of a composition for entry, and the fees of a new charter,—exactions in their own nature sufficiently unpleasant, even when understood to be legally due?

§ 3. *More Error perseveringly inculcated.*

At page 144 of the first edition of the Juridical Styles (1787), it is stated, that "if the property of the lands has "been feued out, and only the superiority meant to be dis-

" poned, this makes no material difference in the disposition, " further than that the deed contains no precept of sasine."

In the second edition (1811), the erroneous idea is expatiated upon. " If (p. 131) the property has been separated " from the superiority, and the latter is to be conveyed as " another separate estate, several variations occur on the form " of the disposition: 1. The obligation to infeft is not alter- " native, as in the simple form already exhibited, but *a me* " *de superiore meo* only, &c. And the deed (p. 132) ought " to contain no precept of sasine; *as it is unquestionably* " *somewhat incongruous for a man to give a precept of* " *sasine for infefting another in a superiority, when the* " *avowed purpose of the transaction is to divest him of that* " *superiority. The disponee's title, therefore, ought always* " *to be completed by resignation.*" All this is copied verbatim into the third edition, p. 145. Nay, that is not the last of it—the whole appears once more in the fourth edition (p. 140), with the exception of the above passage here shown in italics. Its suppression is so far well; for the alleged incongruity, feebly explained, exists only in the confined idea there attached to the word superiority. And, were the case otherwise, would it be of the least importance? If a feudal form adopted by a purchaser's agent be perfectly legal and competent, and perfectly secure, ought any insinuation of its incongruity to be regarded as other than idle nonsense?

If the purchaser of a bare superiority, or of an estate of property and superiority, holding by one title of the Crown, intends forthwith to expede a Resignation-Investiture, it is needless to insert in the Disposition an alternative manner of holding, or a precept of sasine. The practised conveyancer is aware of this; and, when he omits the precept, he does so, not because of any incongruity in the seller of a superiority infefting the purchaser, but because it is superfluous to insert what is not intended to be acted upon.

But the competence in such a case of sasine by the seller, cannot for a moment be doubted. Let it be supposed that

the disposition includes property as well as superiority held by the seller *of* the Crown by one investiture—that the seller dispones all his right, to be holden *a se vel de se*—and that the purchaser obtains sasine on the seller's precept—can it be doubted that such sasine is valid, and that it applies to property and superiority, one estate, holding *pro tempore* of the seller till confirmed by the Crown? And can it be doubted, that when so confirmed, the temporary superiority will fly off, the same as if it had never existed, and that the purchaser will then be the immediate and the entered vassal of the Crown in the seller's stead, possessing on an Investiture of a different name, but equal in all respects to a Resignation-Investiture? Can it make any difference that the *dominium utile* has been subfeued, and that the purchase applies to a bare right of superiority? None whatever; otherwise there would seldom or never be room in practice for a Crown or Principality Charter of Confirmation. A subfeu of a small fraction of an estate would necessarily have the same effect as a subfeu of the whole.

It is unquestionably true that the purpose of a disposition, and of the subsequent procedure, is to divest the disponer and invest the disponee; but, till the requisite procedure be completed, the matter is but in a state of transition; the disponer is not divested till the disponee be received by the disponer's superior. Is it not well that by the alternative manner of holding, the disponer can immediately provide for the interim security of the disponee, without the aid or intervention of the superior? And would it be right that the superior should have it in his power to prevent him? As regards mere form, there cannot be a greater mistake than to suppose that there is no room for the alternative holding, unless the disposition includes *dominium utile*, as well as *dominium directum*. Were such really the case, nothing could be more incongruous than to alienate a right of patronage, which is not an estate divisible into or composed of property and superiority, or consisting entirely of either the one or the

other, but a mere prerogative or privilege; and yet, on comparing the corresponding pages of the different editions of the Juridical Styles (449, 143, 156, 149), the reader may see that it has all along been held to be perfectly competent to dispone a right of patronage, with procuratory and precept, to be holden *a se vel de se*, and to give a valid sasine to the disponee on the disponer's precept.

CHAPTER XVI.

COMPETENCE OF A DOUBLE SET OF TITLES TO THE SAME ESTATE —A RESIGNATION-INVESTITURE AND A CONFIRMATION-INVESTITURE.

When lands are disponed by a vested proprietor, to be holden *a se vel de se*, with procuratory and precept, it is optional to the disponee, at his own good pleasure, to act on the procuratory or on the precept. It is even competent to him to make use of both. Let it be assumed that the disponer's own title is complete, and that he holds the lands immediately of the Crown in feu-farm. The disponee may, if he chooses, take sasine straightway on the precept in the Disposition; in which case the sasine, whilst unconfirmed by the Crown, would apply to the lands in the Disposition, as then held by the disponee in blench-farm of and under the disponer *as temporary superior*. When so confirmed (that is, should the next step adopted by the disponee be the expeding of a Crown Charter of Confirmation), the temporary superiority would be extinguished—not absorbed, but superseded—and the lands would instantly be holden by the disponee immediately of and under the Crown in feu-farm, in the same manner as previously holden by the disponer himself. If there be no flaw in the disponer's precept, or in the sasine thereon, or in the Crown Charter of Confirmation, the disponee's investiture would then be complete. Nevertheless, if so inclined (possibly he may have discovered some error or oversight in his Confirmation-Investiture), it is perfectly competent to him to resign on

the disponer's procuratory, expede a Crown Charter of Resignation, and be thereupon infeft; in which case he would just hold the selfsame estate, immediately of and under the Crown, by one and the same tenure, but by two separate and dissimilar investitures—Resignation and Confirmation—each complete within itself, and neither of them disturbing, or anywise impairing the other. If either be valid, it would *per se* be a sufficient title to the estate. But that the same person may at the same time possess on *both*, is perfectly compatible; or, in the words of the old Style-book, "to be holden in the "same manner, and as freely in all respects as I hold or "might have holden the same; and that either by Resigna-"tion or Confirmation, or both, the one without prejudice of "the other." These two forms of investiture, that may subsist together are, be it remembered, not the two manners of holding spoken of in the obligation to infeft. The blench-holding under the disponer cannot subsist at one and the same time with the proper holding under the disponer's superior. The blench-holding never exists at all, unless the disponee obtain sasine on the disponer's precept. It only then begins to exist, and it instantly terminates when the sasine is confirmed in reference to the alternative manner of holding.

On the other hand, if the only step yet taken by the disponee has been to expede a Resignation-Investiture, it would still be competent to him to take sasine on the disponer's precept, and get the same confirmed by the Crown. I do not say that such procedure, though competent, would be at all advisable; for if the procuratory was valid, and if no error was committed in expeding the Resignation-Investiture, the latter would have the effect of denuding the disponer of all right he ever had to the estate, so that a subsequent sasine on *his* precept could carry nothing. At all events, whilst unconfirmed it would be no better than a blot on the Sasine-Record; and even when confirmed, would be superfluous, except in the case of some defect or blemish in the same party's Resignation-Investiture. True, a superfluity is not a

nullity. If an estate has been purchased from the *true* proprietor, the right so acquired will not be impaired by the same party also buying up the claim of a *pretended* proprietor. In case of a plurality of completed titles to the same estate, if one set or other be good and sufficient, it is of no importance to any party dealing with the proprietor to ascertain which is sufficient and which superfluous. When he sells, he of course sells every right which he has, substantial and unsubstantial.

But great care must be taken in expeding double investitures, that both be in favor of the selfsame party, and both completed, so as to be on precisely the same level, otherwise the titles will be thrown into confusion.

Let it be supposed that a *purchaser*, who has obtained a disposition with procuratory and precept *a se vel de se*, takes sasine on the precept, and sometime afterwards expedes a Resignation-Investiture on the procuratory, without getting the Base sasine confirmed,—and that in this state of matters he dies in possession. The unconfirmed sasine, seeing it was expede before the Resignation-Investiture was completed, would carry the *dominium utile* holden at first blench of the seller, ay and until the completion of the resignation-investiture, when it would be held by the purchaser blench of himself—the effect of the resignation-investiture having been to denude the seller of the temporary superiority remaining with him when the purchaser obtained the base sasine. The purchaser would in fact leave at his death two estates—an estate of *dominium utile* holding blench of himself, and an estate of bare superiority standing interposed between the *dominium utile* and the Crown vassal. Still the resignation-investiture holding of the Crown would have the appearance of being all right. It would seemingly carry the estate purchased, and all the seller's right thereto ; but after the lapse of some time it might be discovered, to the consternation of a number of *bona fide* creditors, who have transacted with the purchaser's heir on the faith of the sufficiency of the Crown title taken up by him, that the same is of no value whatever, and that

the substantial estate is in *hæreditate jacente* of the deceased, standing on the neglected sasine upon the disposition.

Had the purchaser's base investiture been duly confirmed by the Crown whilst he was in life, either before or after completing the resignation-investiture, then the base investiture would have been converted into a public investiture, applicable to the *dominium utile* as then elevated to hold of the Crown. The purchaser would then have ceased to be the interposed superior. The resignation-investiture and the confirmation-investiture would have applied to one and the same estate, holding by one and the same tenure, of and under one and the same superior.

Or, had the purchaser known how best to avoid error and disorder, he would have extinguished the base investiture by resignation in his own hands *ad remanentiam;* and then he would have possessed the estate, property and superiority, of and under the seller's superior, by one investiture perfectly sufficient *per se* to all intents and purposes.

But, let it be supposed that the purchaser neither gets his base investiture resigned *ad remanentiam*, nor elevated by confirmation to the same level with his other investiture, it is evident that the right carried by the one investiture cannot be the same right as that carried by the other. In fact the two investitures would apply to two separate estates, and so long as such is the case, every new transmission made in ignorance of the true state of matters would just increase the irregularity, and render it the more difficult and expensive to rectify the progress.

Say that this same purchaser bargains to sell the lands to a third party, and accordingly grants him a disposition *a se vel de se* with procuratory and precept, such disposition, if rightly understood, would be viewed as conveying two estates, one of a Crown superiority, the other of the *dominium utile* or substantial estate, standing on the disponer's base sasine.

If the disponee obtain sasine on the precept in the disposition, such sasine would apply to both estates, not as a unity, but as two separate estates, just as the disposition itself

applies, or as a decree of adjudication against the disponer would apply to both; or just as if the disponee were to get two dispositions, the one limited to the superiority, and the other to the property. But, in the subsequent operations with the single disposition, some skill is requisite to direct to the proper mode of completing the title of the disponee.

It will not now suffice or be proper to expede a Crown Charter of Confirmation of the two consecutive base sasines, the one in favor of the disponer, and the other of the disponee; because the right carried by the first sasine not having been confirmed in the last disponer's own person, is, at the date of his disposition, a separate estate held otherwise than of the Crown, and therefore not affected by a Crown Charter. To reach the *dominium utile*, the disponee, when entered with the Crown by virtue of the Procuratory, or by Crown-Confirmation of the *de plano* sasine on the Disposition, ought to grant a Charter of Confirmation of his author's and his own sasines, and then, if he wishes to consolidate, he ought to resign in his own hands *ad remanentiam*.

If the disponee resign in the hands of the Crown upon the disponer's procuratory, such resignation can only apply to the Crown-vassalage. The procuratory indeed is capable of being made to apply to both estates; but to reach both it must be separately acted upon. The Crown can only receive resignation of that estate of which the Crown is the immediate superior. The disponee, after being vested as Crown vassal, may, in virtue of the same procuratory, receive resignation and grant a Charter in his own favor, to reach the *dominium utile;* but, unless he do so, or be in some other competent form validly vested in the *dominium utile*, any Deed of security, or any investiture granted by him, can only apply to the Crown superiority in which he is actually vested, and which may be of no value whatever to his creditor or disponee.

It being, as now explained, perfectly competent to a purchaser or disponee to hold the same estate by two separate investitures, it is equally competent to him to possess on a

compound investiture, combining resignation and confirmation. I do not here allude to the common case, or such like, where a purchase is made and a procuratory obtained from a party base-infeft, and where the purchaser resigns on the procuratory, expeding at the same time Confirmation of the seller's base-investiture. In the Compound Investiture, respecting the competency of which I am now speaking, Resignation and Confirmation are combined in the purchaser's own individual favor—thus: On obtaining from a fully vested proprietor of an estate holding of the Crown, a Disposition containing procuratory and precept, the purchaser may forthwith take sasine on the precept, and afterwards, in virtue of the procuratory, expede a Crown-charter of Resignation, containing, of course, a Crown precept for new sasine, and likewise containing Confirmation of the Disposition, and of his *de plano* sasine thereon. But, in such case, he must on no account neglect to exhaust in his own favor the precept in the Crown-charter—he must not assign it to a third party.

It was about the year 1720, that this compound form was introduced into practice. It was kept up for a good many years by some men of business of the old school, as being in their apprehension the most eligible mode of completing a purchaser's titles to an estate holding of the Crown; but such practice, as it greatly increased the chances of oversights and mistakes, must often have been attended with inconvenient consequences. It will always be found that the less complex a proprietor's title is the better, and that a due regard to economy and simplicity is the safest of all rules. At all events, not the smallest advantage can be derived from possessing on a Compound Investiture, or on two separate and distinct Investitures, the one of Resignation, and the other of Confirmation.

This Work, which I have all along endeavoured to confine within as narrow bounds as possible, may now be brought to

a close, as it would be foreign to its nature and purpose to enter upon any speculation regarding the benefits to society, and to individuals, that have resulted and may yet result from the valuable statutes of 1845 and 1847. I therefore beg leave, by way of *finale*, to subjoin the following

COROLLARIES

FROM ASCERTAINED PRINCIPLES.

1. Let it be supposed that the proprietor of an estate, fully vested by Crown-charter and sasine in property and superiority undivided, sells and dispones, to be holden *a se vel de se*, with procuratory and precept,—and let it be supposed that the purchaser expedes a *de plano* sasine on the precept, and then gets the Disposition and sasine confirmed by the Crown, —the consequence would be that the seller's procuratory would be for ever sopited, so as to be altogether unavailable to any third party to whom it might be assigned, or by whom it might be adjudged.

2. Yet, after getting the *de plano* sasine confirmed as above, it is still competent to the purchaser himself (if not deterred by the consideration of incurring useless expense) to resign on the procuratory, and no other harm would ensue, provided he himself be duly infeft on the Resignation-charter.

3. If the purchaser, after obtaining sasine on the seller's precept, shall, without getting such sasine and its warrant confirmed, resign on the seller's procuratory, and be infeft on the Resignation-charter,—then, so long as the titles remain in that state, property and superiority shall be disunited, and shall form two separate estates, as unquestionably as if the *dominium utile* had been held of and under the seller by a separate investiture, before he granted the procuratory.

4. On the other hand, if the purchaser, disregarding the seller's precept, shall expede a Crown-charter of Resignation,

and be thereupon infeft, he will thereby completely and for ever sopite such precept, so as to render it unavailable to any third party; because, in the absence of any mid-impediment, the Resignation-investiture carries property and superiority just as they were held by the seller himself. These cannot then be disunited by acting on the seller's precept; because the whole virtue of that precept expired on the instant the sasine on the Crown precept was sent to the record. This last sasine will then form an insuperable mid-impediment to the efficacy of any subsequent sasine on the seller's precept in favor of a third party. Were the case otherwise, a seller's precept not yet acted upon would never cease to be available —whereas being truly nothing more or less than the warrant of a subordinate sasine, intended as a temporary protection to the purchaser or disponee till duly entered with the Crown, it obviously becomes entirely useless if not acted upon before such entry is obtained. Were the purchaser to assign the seller's precept to a third party, such party's sasine would carry *nothing*, because the previous sasine on the Crown precept carried *everything*.

5. Nevertheless it is competent to the purchaser himself, after expeding a Resignation-investiture, to obtain sasine in his own favor on the seller's precept, and get it confirmed by the Crown—for then he would just hold the estate (property and superiority one estate), both by resignation and by confirmation, each investiture serving the same end, and the one being nowise detrimental to or incompatible with the other.

6. But so long as the second sasine shall remain unconfirmed, it will be of no value whatever; and if the purchaser shall die without getting it confirmed, it will just be a blot on the sasine-record; unless it shall afterwards be discovered that the purchaser's Resignation-investiture was null *ab initio*, which it would undoubtedly be, if granted by the prince instead of the Crown, or if in any other respect radically erroneous.

7. The state of matters is widely different, when the seller possesses property and superiority on separate titles; that is when he stands infeft in the *dominium directum* holding of the Crown, and in the *dominium utile* holding of himself. In such case a Resignation-investiture obtained from the Crown, before expeding sasine on the seller's precept, would not deprive that precept of virtue. It would only apply to the *dominium directum;* and there would still remain the *dominium utile*, which might be secured by sasine on the seller's precept at any time thereafter—as effectually as it would be by sasine on such precept before acting on the procuratory. But, in either of these cases, the disposition and sasine obtained from the seller could only be regarded as a base investiture, till duly confirmed by the purchaser himself, when fully vested as Crown vassal.

8. In the case last supposed, where the seller's disposition contains the two estates of property and superiority disunited, the requisite investitures may be completed by acting on the seller's procuratory only, disregarding his precept. Thus, in the first place, the *dominium directum* may in virtue thereof be resigned in the hands of the Crown for new investiture; and, 2dly, after the purchaser is duly vested in the *dominium directum*, the *dominium utile* may in virtue of the same procuratory be resigned in his own hands, for new investiture to be granted by himself in his own favor. But were the purchaser so to vest himself, he would for ever sopite the seller's precept, so that if assigned to another party it could carry nothing—because, between the Crown-investiture and the investiture thereafter granted by the purchaser himself, the two estates of superiority and property would be completely taken up, and there would remain nothing to be carried by a *subsequent* sasine on the seller's precept.

9. In the same case, where the Disposition contains property and superiority disunited, the requisite investitures may be validly completed by acting on the seller's precept alone

disregarding his procuratory. Thus, one *de plano* sasine on said precept, if nothing else intervene, will apply to both estates, or to either of them; and the seller's disposition and sasine may be effectually confirmed, first, by the Crown so as to vest the purchaser in the *dominium directum*, and 2dly, by the purchaser himself when so vested, to perfect his title to the *dominium utile*.

These corollaries, and the principles from which they are deduced, are applicable to any feudal property, whether held of the Crown, or of the prince, or of any subject-superior.

But however harmonious and consistent with each other the principles of the Feudal System of Scotland may be, it is high time that the commerce of land within that part of Great Britain should be no longer trammelled by any such System.

NOTE A.—Page 71.

The Ancient Silver Penny.

Excerpt from the Statute of Prices, *Assisa panis et Cervisiæ*, 51 Henry III Stat. 1. § 3. year 1266: "An English peny, called a Sterling, round and "without any clipping, shall weigh xxxii wheat corns in the midst of the ear, "and xx^{d} do make an ounce, and xii ounces one pound."

Excerpt from Confirmed Charter (Hadinton Collection) by Thomas Earl of Mar, Chamberlain of Scotland, to John of Mar, a canon of Aberdeen, confirmed by K. David II, 22 Nov. 1358: "Reddendo inde, &c. unum denarium argenti, qui "vocatur Sterlingus, nomine albæ firmæ."

The first money coined in Scotland, and even in England, was the silver penny, (*denarius argenti*) generally of the same size as the sixpence of present British currency, sometimes even broader, but always much thinner—its average weight being 22½ grains, just half a grain more than the present three-penny piece. By the Anglo-Saxons in South Britain, before the Norman Conquest, and by the Anglo-Normans afterwards, the pound-weight of silver, divided in an off-hand manner, was coined for trading purposes into 240 pennies—hence the 240th part of the twelve-ounce pound is still called a pennyweight. The first artificers were Germans, who had been invited or encouraged to settle in England; and, as they had come from the East, the coins, their workmanship, were called Easterlings, by contraction Sterlings—converted in process of time into the adjective *sterling*, denoting standard or genuine. The oldest Scottish pennies hitherto discovered are those of Alexander I, David I, and William the Lion. If any were coined by Malcolm IV, William's elder brother, they have hitherto eluded observation. Even in those remote ages money was reckoned in Britain by pounds, shillings, and pence; but, excepting foreign coins, the

native silver pennies or Easterlings (cut into two for halfpennies, and into four for farthings) were long the only currency of England and Scotland, and long of equal weight and purity in both kingdoms. Round half-pennies were first coined in Scotland in the time of Alexander III, and round farthings (both of silver) in the time of Robert I. Gold was first coined in Scotland by Robert II, and copper by James III. Till a comparatively recent period, the shilling was not a coin in either kingdom, but only a quantitive denomination. With the Saxons it was sometimes understood to contain 4 pennies, whereof 60 went to the pound-weight,—sometimes 5 pennies, or 48 to the pound,—and sometimes 20 pennies, or 12 to the pound; but since the Conquest it has always been understood that the money-pound contains 20 shillings, of 12 pence to the shilling. Groats, or silver pieces of 4 pennies, were first coined by David II, and were the largest Scottish coins in circulation till after the marriage of Queen Mary to Lord Darnley. Shillings were first coined in England about the year 1503; by which time, in consequence of a long course of injudicious management, the currency of that kingdom had become so debased as that one genuine Easterling was intrinsically of rather more value than three English pennies. But this was nothing compared to the then or subsequent state of the Scottish currency. The first Scottish coin equivalent to the English shilling did not appear till some years after James VI had succeeded to the Crown of England. It was marked XII behind the king's bust; denoting doubtless that it was current for twelve English pence, or twelve Scottish shillings. There can however be no doubt that, in Scotland as well as in England, the ancient shilling of account was understood to contain 12 Easterlings. Had there been anciently in circulation, say before the year 1400, a silver coin of that amount, it would have weighed rather more than three British shillings; and from the then comparative scarcity and high intrinsic value of silver, it would probably have been more available in any market than 20 British shillings now are. In testing the weight of any ancient coin of Scotland or England, this ought always to be borne in mind that the ancient Saxon pound, originally used at the Tower of London, where the ancient natives had their principal Mint, was lighter than the Troy pound (adopted in the 18th year of Henry VIII) in the proportion of 15 to 16. Both contained the same number of

pennyweights; but the Saxon pennyweight contained only 22½ grains, whereas the Troy pennyweight contains 24 grains—difference on the pound-weight 360 grains, or three quarters of an ounce. The silver coinage of Great Britain has always been regulated by the Troy pound; but then the pound-weight of silver, after the usual mintage-deduction or Seignorage (unknown to the first artificers), is coined into three money-pounds—less than 4 ounces Troy into 20 shillings. It is evident that were 3 ounces and two-thirds of an ounce of silver (the weight as closely as can be distinctly stated of four new crown-pieces) to be coined into 240 pennies, they would be so minute as to be quite inconvenient for commercial purposes.

Troy-weight, be it remembered, is very different from Avoirdupois or Grocers'-weight, where the pound, heavier than the Troy pound in the proportion of 14 to 17, or rather of 144 to 175, is divided into 16 ounces, and where of course the ounce is not of equal weight with the Troy-ounce.

NOTE B.—Page 84.

ADDITIONAL PARTICULARS REGARDING THE TWO HERITABLE OFFICES WHICH BELONGED TO THE EARL OF DUNDEE.

In reference to the Charter of the Constableship, by Sir William Wallace in favor of the Royal Standard-Bearer, it is stated (page 81) that both offices continued with the Grantee's descendants *in the male line*, till the death of the Earl of Dundee in 1668, when they, and such of his landed estates as were destined to male heirs, were *gifted* by King Charles II as *ultimus hæres masculus jure coronæ* to Lord Hatton, younger brother of the Duke of Lauderdale.

The following additional particulars, not generally known, cannot fail to prove interesting to some readers.

Lord Hatton having raised an action of Declarator founded on the Royal Gift, appearance was made for John Scrimgeour of Kirkton, whose father, grandfather, and great-grandfather, of the same name, were descended of the eldest daughter of the eighth Constable, and who, through them, claimed the succession as heir by substitution, failing heirs-male of the Earl's own body, conform to the tallied destination in a Crown-charter produced in process by Lord Hatton himself; and also offered to prove, if allowed inspection of the deceased Earl's Charter-chest, that he was related to him within the ninth degree of consanguinity, all in the male line. Appearance was likewise made for a host of creditors, who claimed payment of their debts out of the Royal Gift. To elude these claims that Gift was abandoned, and another obtained, founded on the feudal penalty termed Recognition, peculiar to Ward-holding—it having been discovered, from the Contents of the Charter-chest, that the deceased Earl, and his father and grandfather, had, by divers subfeus, in satisfaction of debts and otherwise, alienated

without leave the greater half of the estates. Kirkton and the creditors remonstrated; but it was then the fashion (and when was it not so?) for those in power to carry everything with a high hand. Lord Hatton, however, was not long permitted to enjoy in peace the estates so acquired. Besides being involved in a multiplicity of litigations with the subfeuars and others, which must have occasioned him great annoyance, he was at no great distance of time overtaken by a sad reverse of fortune, in consequence of political persecution, chiefly instigated by the first Earl of Aberdeen, and Colonel John Graham of Claverhouse.

Soon after the death, in August 1682, of his brother the Duke, whose political influence had been on the wane some time before he died, Lord Hatton (then Earl Charles) lost all his interest at court —was deprived of all his public offices, of General of the Mint, Lord Treasurer-depute of the Revenue of Scotland, Lord of Session, and Sheriff-Principal or High Sheriff of the county of Mid-Lothian, —and subjected to a rancorous prosecution, at the instance of the Crown, for alleged malversations in the management of the Mint. A summons concluding for £58,000 sterling (Lord Fountainhall says £72,000), was called in Court in January 1683, against the Earl of Lauderdale, his son Richard Maitland (who had in September 1668 been conjoined with him in the first-mentioned office), and the inferior officers of the Mint. The Earl was the only defender for whom appearance was made, his son having submitted to his Majesty's mercy, and the rest having been cajoled by assurances of his Majesty's indemnity, provided they would offer no opposition to decree being pronounced against the Earl and themselves. Finding that no regard was paid to his pleas or defences, the Earl deserted the cause, and decree was pronounced against him, and his son, and all the other defenders, *in solidum*, for payment to his Majesty of sundry articulate sums, extending together to £57,000 sterling. After the lapse of two or three months, the King, beginning to relent, addressed a letter to the then Lord Treasurer, importing that not being unmindful of the signal services of the Earl of Lauderdale and his predecessors, he was disposed to grant him and his son a discharge of the decree on certain lenient conditions, viz. 1st, that they should dispone to the Earl of Aberdeen the estate of Dudhope (with the exception of the mansion-house yards and parks), and all the lands belonging to them within ten miles of the town of Dundee, including those

within the town and in the Bonnet Hill, now called the Hilton of Dundee; or otherwise to pay to the said Earl of Aberdeen the sum of £16,000 sterling; 2dly, to dispone to Colonel Graham the mansion-house yards and parks of Dudhope, and the office of constabulary, with its jurisdictions, superiorities, and privileges, including the emoluments of the First Fair of Dundee (an annual public market commonly so called),—or otherwise to pay him a sum of £4000; and, 3dly, to renounce and discharge their relief against all the other defenders. And, on the other hand, it was understood that the Earl of Aberdeen and Colonel Graham, on receiving their respective conveyances or alternative sums of money, were to have made payment to his Majesty, each of them, of a sum equal to twenty years' purchase of the lands appointed to be disponed to them respectively.

Being charged by the Earl of Aberdeen to implement within six days his part of the King's letter, the Earl of Lauderdale, and his son Lord Maitland, entered into a compromise with him, whereby they agreed to pay, and accordingly granted him their joint and several bond for £100,000 Scots (equal to £8333, 6s. 8d. sterling), held to be considerably within the value of the lands which, but for that or some other mutual arrangement, they would have been under the necessity of disponing to him.

It was expected that Colonel Graham, who at first was the mere coadjutor for attaining the purposes of the Earl of Aberdeen, would in like manner have listened to terms of accommodation. But nothing would satisfy him short of full implement of his part of the King's letter. A Disposition, to the effect insisted on, was therefore written out and subscribed on 10th August 1683, but lay over till March 1684, in the expectation that Claverhouse would have agreed to milder terms. He, however, was inexorable. He even refused to make payment to John Maitland, the Earl's second son (whom King Charles had constituted his donator), of twenty years' purchase of the enclosures of Dudhope, which was ascertained to be only £6000 Scots,—and, being backed by the King, no alternative remained but submission. The disposition, after being judicially ratified by Lady Maitland, was accordingly delivered, and Resignation having been made with concurrence of the foresaid John Scrimgeour of Kirkton, Claverhouse, in April 1684, obtained a Crown-charter.

After all, it appears that before the end of the year 1684, Earl

Charles and Lord Maitland were permitted, and indeed encouraged, by the King, to institute an action of Reduction *ex capite metus et concussionis*, of the bonds which had been granted by them and their sureties to the Earl of Aberdeen, for the £100,000 Scots; and the cause was progressing with every appearance of a speedy and successful issue in their favor, when the news arrived in Edinburgh (10th February 1685) of his Majesty's death. This occasioned a temporary turn of the tide; for the cause coming to be advised on the 17th, six Lords voted for Aberdeen, that the main ground of Reduction (a threatened *criminal* prosecution) was not relevant. The majority, however, being of a different opinion, the cause proceeded, but was not brought to a close till 13th January 1692, when the Lords reduced the bonds, and repelled the plea of transaction and homologation.

The sequel of the story of the Constableship is soon told. In May 1689 Claverhouse, then Viscount of Dundee, fell at Killicrankie. In 1690, decree of forfeiture of all his estates was pronounced by the Parliament of Scotland,—and the whole were afterwards conferred on James, the second Marquis of Douglas, by Royal charter, dated 29th March, and sealed 26th June 1694. In 1748, after the abolition of heritable jurisdictions, Archibald Duke of Douglas received £1800 as compensation for his loss of the jurisdiction of the Constabulary of Dundee, and £100, 9s. 1d. for the loss of the jurisdiction of the Regality of Dudhope.

[*Authorities—Lord Fountainhall, passim—Harcarse, No.* 556, *Books of Peerage—Great Seal Record—Statutes of Scottish Parliaments—Acts of Sederunt, &c.*]

The office of Heritable Standard-Bearer, not being lucrative, was not coveted by the Earl of Aberdeen or his associate, and still remains in the Lauderdale family.

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